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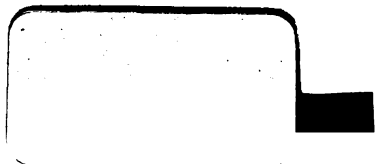
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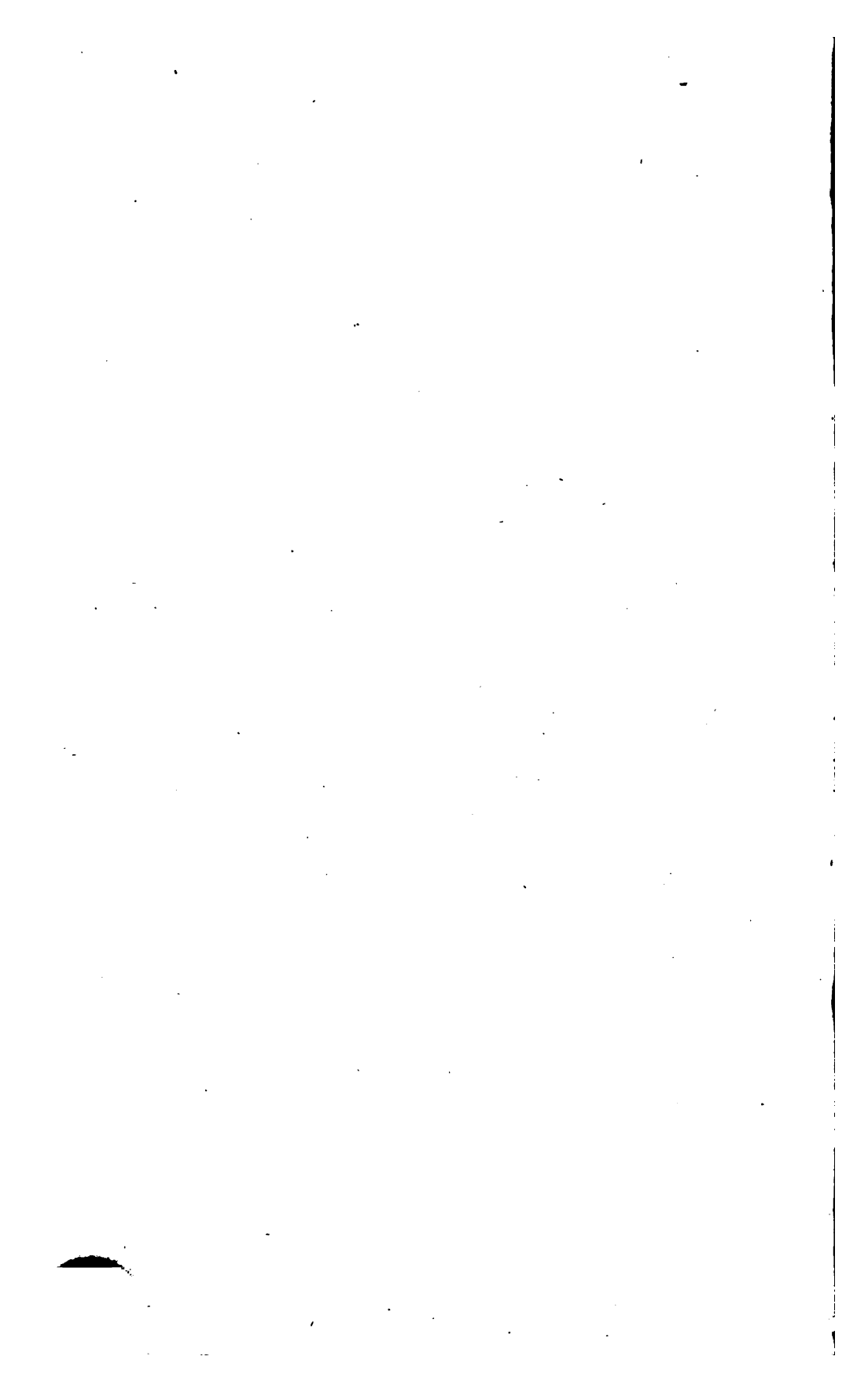
LONDON:
J. BUTTERWORTH AND SON, 43, FLEET STREET.

1827.

PRINTED BY J. AND T. CLARKE, ST. JOHN-SQUARE, LONDON.

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THIS Tract was originally published in a co-temporary work. For the convenience of reference it is now given in a separate shape. It is printed in the same size as the New Edition of Watkins' Principles, in order that it may be bound up with it, if the subjects are not considered too dissimilar.



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OBSERVATIONS,

&c.

CHAPTER I.

Of the mode of deducing a title to all or part of a general allotment made in respect of lands of different tenures, or derived through different channels.

INCLOSURE commissioners assume to themselves the most arbitrary control in the management of all matters connected with their trust. The advice of counsel they not only never take, but uniformly reject when submitted to them. The remarks of soli-

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citors too, are usually treated in a way to prevent repetition. The commissioners read the act as excluding from their consideration all subjects not immediately connected with roads, rates, and acres. The addition of a few explanatory words in their award not connected with those subjects, is deemed an infringement on the act and an abuse of their powers.

The act provides that the award shall not merely express the quantity of acres in each allotment, but contain "all such other rules, orders, agreements, regulations, *directions*, and determinations, as the said commissioners shall *think necessary, proper, or beneficial to the parties*," s. 35. If the necessity of any particular *direction* be not immediately apparent, the commissioners will not admit of any explanation as to its beneficial tendency; much less will they enter into a consideration of the evils of its omission. The consequence is, that there is scarcely a title

which is not in some degree involved in serious difficulties, arising from this injudicious and unadvised mode of executing the inclosure commission.

By the 7th section of the General Inclosure Act,¹ it is declared, that the commissioners shall not *determine any dispute touching title to lands*, but shall set out the allotments to the persons in actual possession of the lands in lieu or in right whereof the allotments are made, and that no suit touching such title shall delay the division or inclosure. Under a misapprehension of this section, commissioners invariably affirm, that they are prohibited from interfering with titles in the slightest degree. On this principle they make their allotments generally, without distinguishing which allotment is made in respect of freehold, and which, in respect of

¹ 41 Geo. 3. c. 109.

leasehold property, and without appropriating to any farm in particular a separate allotment.

There is a clause in most local acts, communicating the title of the old inclosures to the lands allotted. This inconvenience then arises : if a proprietor have lands derived through five different titles, some copyhold, some leasehold, and some freehold, and five separate allotments are made to him, every part of all the allotments will be subject to the whole of those titles ; that is, a purchaser cannot be advised to complete his contract for the purchase of all or any one of the allotments, without satisfying himself as to the soundness of all the five titles ; for if one title be defective, and an eviction ensue, he cannot ascertain the particular allotment or part of allotment which will be recovered ; and no prudent purchaser could be advised to pay his money for land surrounded with such uncertainty of possession.

In one instance, says a learned writer, it was reasonably computed that there must have been *two hundred* different abstracts, to shew the real state of the title; and in another, says the same writer, "a vendor abated *twenty thousand*¹ out of sixty thousand pounds, rather than have the contract rescinded on account of an objection insisting on this defect, that since the lands were not ascertainable, the court could not decree performance with an abatement."² This evil is so general and alarming, and productive of so much inconvenience and expense, as in the writer's opinion to call for immediate legislative interference, empowering the old commissioners, or new ones to be duly ap-

¹ It could not surely have cost this sum to have obtained even an act of parliament for amendment of the defect, and the legislature could scarcely have refused an act under the circumstances: but delay perhaps would have lost the purchaser.

² 1 *Pres. Abs.* 88, 89.

pointed, to appropriate such general allotments according to the respective titles of the proprietor. Indeed, without an act of parliament for the purpose, it is difficult to discover any sure mode of division.

In practice, three modes of partition suggest themselves :—

1st.—A commission out of Chancery to ascertain metes and bounds, or generally for a partition.

2d.—An appropriation by the old commissioners *after* they have signed and completed their award, under the case of *Haggerston v. Dugmore* ; and

3d.—A conveyance of all or so much of the allotment as is freehold, and an assignment of all or so much of it as is leasehold.

With respect to the *first* suggestion, it is not clear that a court of equity will grant a commission to ascertain the boundaries of intermixed lands belonging to one proprietor. Lord Northington was of opinion, that the court has simply no jurisdiction to settle the boundaries of land unless some equity is superinduced by the act of the parties; and on that ground his lordship dismissed a bill to ascertain the boundaries of two manors, there being no dispute as to the soil.¹ Sir William Grant also was of opinion, that the circumstance of a confusion of boundaries furnished, *per se*, no ground for the interposition of the court, and refused to entertain a bill of this description between two independent proprietors to force either to have his right so determined.²

¹ *Wade v. Conyers*, 2 *Cox*, 360.

² *Speer v. Cawter*, 2 *Meriv.* 418.

The principal instances in which such commissions have been granted, are where a lessee or copyhold tenant, having freeholds of their own, have laid all the lands together for convenience of occupation, and so confounded the boundaries that at a future period it becomes difficult to ascertain what belongs to the lord and what to the tenant; in which case the commission generally directs that if the lands cannot be ascertained, the commissioners are to set out so much of the land of the tenant as is of equal value to the leasehold or copyhold premises undistinguishable.¹

It is questionable, therefore, whether a court of equity has any jurisdiction in the case alluded to. The lands have never been divided and apportioned; and to call upon the

¹ Attorney General *v.* Fullarton, 2 *Ves. & Bea.* 264. Leeds (Duke) *v.* Strafford, 4 *Ves.* 180. *Hov. Frauds*, 239.

Court of Chancery to make such apportionment, is to petition the court to perform the duty of the inclosure commissioners. Equity might as well be called on in the first instance to divide and allot, as to apportion or be the means of apportioning the allotment after the award is signed and published ; and it is difficult to conceive how a commission could issue to distinguish *boundaries* which have *never* been ascertained.

A bill in equity for partition seems a more inapplicable remedy for the evil complained of than a commission to ascertain boundaries. This is evident on slight consideration. Neither by the common law, nor by the statutes of *Hen. 8.* and *Wil. 3.* could a remedy possibly have been anticipated by way of writ or bill for partition.

A case indeed in Vesey's Reports,¹ seems

¹ *Agar v. Fairfax*, 17 *Ves.* 533.

at first sight to sanction a different opinion, but on inspection that case will be found to have quite a different tendency. The partition there was of a moor held in common by persons whose shares were not ascertained, and it was referred to a Master to ascertain the exact value of those shares, and then it was ordered that the moor should be divided among the joint-proprietors according to that valuation.

The lord of the manor and his commoners are together seised of the waste, but a court of equity would not, it is apprehended, on the authority of this case extensive as some expressions in it are, entertain a bill by the lord or any particular commoner, for a partition of the waste which he and the other commoners are entitled to jointly. The lord may approve certain parts of the waste, provided he leave sufficient common for his tenants ; but he cannot by any means at law or in equity compel a division and inclosure of the common against

their consent,—*that* can only be accomplished by means of an act of parliament.

Secondly, The case of *Haggerston v. Dugmore*,¹ was shortly this—The commissioners made their award in 1811, having previously levied a rate for completion of the roads rendered necessary by the inclosure. The roads were not finished at the time the award was executed ; and four years *after*, it was found that the sum assessed for perfecting them was very inadequate for the purpose. The commissioners *then* levied a fresh rate, and the question was, whether this rate was legally imposed. It was contended on the part of the occupiers, that the commissioners, before they executed their award, might have limited a time for completing the roads, and imposed a rate to defray the expenses of the same ; but having made their award their

¹ *Haggerston v. Dugmore*, 1 *Barn. & Ald.* 82. ; and see *Rex v. Washbrook*, 4 *Barn. & Cress.* 732.

authority, like that of other arbitrators, was wholly at an end.

Bayley, J. thought that as there was not any express provision in the act that the award should be final, it followed from the nature of the subject, that the power of the commissioners should continue until they had finally executed the duty imposed on them, one part of which duty was to complete the roads. And *per Holroyd, J. the power of the commissioners must, from the reason of the thing, continue till they have fully executed the duty imposed upon them by the act; till the roads have been completed, they have not fully discharged their duty, and therefore their authority is not fully executed. The argument (if of any weight) rather went to affect the award of the commissioners, than to prove that they had executed their authority. The court, therefore, refused a rule to set aside a nonsuit, which declared that the rate was legally assessed.*

From this case it may be inferred, that inclosure commissioners have power to make a second award, if the first be imperfect, or not fully executed. If the commissioners could be prevailed upon to execute such second award to meet the evils above alluded to, (but which they would not perhaps very readily do), a purchaser would probably find considerable difficulty in attempting to rescind his contract, on the ground that the lands were not sufficiently ascertained ; but of course, implicit reliance cannot be placed on this general inference, in the absence of decision, especially as the above-mentioned case turned on matter of necessity ; whereas, the defect in contemplation may be said to be matter of convenience only.

The third mode of obviating the difficulty can obviously apply to those few cases only, where the lands are derived through two or three light titles ; and then if one title be leasehold, and the purchaser has contracted for freehold and insists on a conveyance of free-

hold, entirely, the plan is rendered nugatory. Besides the inconvenience of tracing three titles, freehold, copyhold, and leasehold, even if they are not individually of any great extent, with attested copies, covenants to produce deeds, &c., a future purchaser may object to complete his title without a strict legal division of the allotments, on the ground that the expense of such division may ultimately fall upon himself ; and if his object be a vote for county elections, it is questionable whether he can be denominated a freeholder, when his land may eventually be declared to comprise the entire allotment in respect of the leasehold property of the former owner.

On the whole, therefore, an act of parliament seems the only sure mode of meeting the difficulty ; and it would evidently be to the interest of all owners of land so situated, to petition parliament for general relief, rather than be put to the expense of a separate act for each individual case.

Such act may empower and enjoin the old commissioners, where they are living, to review their awards at the request of the owners of the allotments, and to make a supplemental award specifying the required appropriation. If the old commissioners are dead, then it may provide that new ones be appointed, pursuant to the requisitions in each respective act, for the aforesaid purposes and for the completion and correction of all other unfinished or informal proceedings and transactions under each respective act. Or a general set of commissioners may be appointed to make and register the requisite specification; or perhaps, the better enactment would be, to allow the owners of the fee, by deed enrolled with the clerk of the peace, to declare their election, which allotment shall be in lieu of one title and which of another, and each title may be referred to by the last purchase deed, or by a schedule containing the principal documents.

Since writing the above it has been suggested to me, that I am "labouring under a mistake in attributing to the commissioners the evil complained of. The truth is," says my informant,¹ "that the source of the evil rests with the parties themselves, who negligently in many cases, ignorantly in others, and obstinately in some, omit to make statements of their different titles upon the face of their claims. One case," he adds, "came under his own observation, where a gentleman had purchased very considerable estates in a parish from a great number of different persons, and some parts of these estates were very intricately circumstanced in point of title.

¹ B. J. Wake, Esq., a respectable solicitor at Sheffield.

On behalf of this gentleman the writer (who was his solicitor) obtained an act of parliament for the inclosure of the commons in this parish, which commons contained several thousand acres. Being aware of the circumstances respecting the titles, he strongly recommended his client to require the commissioners to distinguish in his award, what allotments he set out in right of each of the estates, but the owner of them positively refused to give himself the trouble ; and though he was a gentleman of more than an ordinary share of intelligence and talent he treated the caution as a nonsensical subtilty in conveyancing : a practice which country gentlemen, so much to their subsequent costs and vexation, are too apt to adopt and persist in. There might however be another reason operating on this gentleman's mind : viz. the intention he had of keeping his estate until time should find a remedy for the anticipated defect. Time however brought with it occasion for the sale of the estates in a great many

lots ; the objection was of course taken, and the expence of an act of parliament was sustained to perfect the titles." My informant then repeats, "with a considerable degree of confidence, that it is not the commissioner but the claimant to common right who is to cry *mea culpa*." And he says, "he personally knows and respects many gentlemen who have acted as commissioners, and he discards every doubt when he declares, that those whom he does know, never would cause to the parties by whom they were employed such a serious temporal calamity, as Mr. C. with great truth has stated to prevail."

There can be no doubt, that a due specification of the titles in the claim would obviate the difficulty if the commissioners would attend to that specification in their award ; but inclosure commissioners uniformly evince a disposition to reject the additional trouble of subdividing each allotment according to the titles of the different owners ; and it must

be confessed, that such fractional divisions would cost them nearly three times as much labour as the original division into proprietorial allotments. Then their award would be swollen to nearly three times the size, and the expense, already excessive, would become intolerable. However, it cannot now be of much avail to discover the origin of the evil, when upwards of five thousand inclosures have, at an expense of nearly ten millions of money, already been made. All these inclosures are more or less affected with this mode of executing the trust, and a remedy for the evil seems the more legitimate object for consideration, than the means of its prevention in future.

I shall close this Chapter by the addition of another of the numerous instances of inefficient conduct in the inclosure trust, which, whether the origin of it lies in reality with the commissioners or the parties themselves, is *prima facie* to be attributed to the commis-

sioners, who being placed by Government in a confidential and official situation, are to be held responsible for any want of information which they may negligently omit to call for.

A proprietor of lands in the parish of Kettering was entitled to certain open and common field lands, held of the manor of Kettering as copyhold of inheritance. His wife was also entitled to rights of common in the same parish, in respect of a copyhold house held of the rectory of the manor of Kettering (a totally distinct manor from the manor of Kettering). On an inclosure of the parish, the commissioners awarded to the husband one general allotment of ninety acres in lieu of all the open and common field lands and rights of common of the said husband and wife, within the said manors and parish, and the husband was admitted to the whole allotment in the manor of Kettering. The husband enjoyed the property for upwards of twenty years, and died seised thereof; on his death

his heir at law entered, and contracted to sell. The purchaser objected to the title, on the ground that the *lord of the rectory manor* had a right to reclaim a portion of the general allotment as appurtenant to his manor. The obstinacy of this objection lost the purchaser, and very much deteriorated the value of the other property connected with it. The difficulty was to ascertain the parties to the apportionment. The concurrence of the lords of the two manors was clearly necessary, as also of the wife and her husband, she having married again. Then the amalgamation of the titles, and the trouble and expense of obtaining the concurrence of these distant parties, was estimated at nearly the value of the allotment.

CHAPTER II.

*Of the title to allotments in lieu of leasehold or
copyhold rights.*

WITH respect to *leaseholds*, it is clear from the decided cases,¹ that the allotment as it comes from the commissioners, is, in point of estate, a freehold in fee simple of the tenure of common socage ; and the provision in most local acts communicating the original title to the land allotted, conveys the legal estate of the allotment to the use of the allottee, for the term, with remainder, to the use of the reversioner in fee. If, however, that provi-

¹ Doe v. Davidson, 2 Maule & Selw. 175. Townley v. Gibson, 2 T. R. 171.

sion be omitted in the local act, it is apprehended, that as no provision of a similar import is in the general act, the lessee will be entitled to the allotment in fee simple—in trust, nevertheless, after the expiration of the term for the reversioner in fee ; and it is probable he would be compelled to convey to uses corresponding with the beneficial interests in the estate.

In reference to *copyholds*, it has been expressly decided, that allotments to a copyholder in lieu of his rights of common, are of a freehold and not of a copyhold tenure, though the copyholder himself should even agree that the allotments be held by copy of Court Roll according to the custom of the manor. In a late case,¹ an issue was directed under an inclosure act, to try whether allotments made to copyholders in respect of their

¹ Revell v. Jodrell, 2 T. R. 424.

copyhold lands and rights of common, were freehold or copyhold. The cause was tried at the assizes, but the point was reserved for the opinion of the Court of King's Bench. Ashhurst, J. in delivering the opinion of the Court above, said, that to decide the question in dispute, it was only necessary to consider what was the nature of a copyhold, and what were the incidents inseparable from it. It had been clearly held, that a copyhold must be time out of mind, and could not begin at this day.¹ Then, was the land now in question ever demised, or demisable? and had the custom of the manor ever taken hold of it? It clearly had not. Then, it never could be copyhold, and of course must pass as freehold. But it was argued that this should become copyhold by operation of law, as the accessory must always follow the nature of its principal. The misfortune was, that no instance had been shewn in which a copyhold

¹ *Co. Litt.* 58 b. *Kempe v. Carter*, 1 *Leon.* 55.

was ever created by operation of law ; and for this plain reason, that *a copyhold was not a creature of law but of fact* ; it must have custom to support it, and could not be created by any other mode, unless by act of parliament, which might operate as an estoppel to any man to say that it had not existed time out of mind. Therefore, on the whole, their lordships were very clearly of opinion, that the allotments in question were freehold, and the *postea* was directed accordingly.

In a second case,¹ allotments were made to W. L., in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commoners, that the common should be divided between them ; and an award was made in pursuance of this agreement, which was after-

¹ Doe v. Davidson, 2 Maule & Selw. 175.

wards confirmed by an Inclosure Act. The act saved to the lord the seignories, and all rents, services, courts, &c., and all other royalties, jurisdictions, and pre-eminences incident to the manor, *in tam amplo modo* as he might have enjoyed the same in case the act had not passed ; and also contained a clause that nothing should alter or annul any settlements, &c. affecting the lands to be inclosed, but that the several allotments should be held by the several persons to whom they were allotted to the same uses, and for the *same estates*, and subject to such limitations, &c. as the lands in respect of which such allotments were made were limited and subject to.

The questions in the cause resolved themselves to this, whether the allotments to the tenants were of the same tenure as their customary estates. It was argued, that the saving clause in the act must have had the effect of making these allotments customary tenure ; for otherwise they would be freehold with in-

cidents inconsistent with a freehold tenure. The Judges, however, thought differently. In delivering their opinions *seriatim*, Lord Ellenborough said, that if it were the intention of the parties, by the agreement, to constitute an estate of a customary nature in these allotments, it was a thing which by the law of the land they were *not competent to do*; because it was an essential quality of such an estate, that it must have been immemorially demised or demiseable as customary estate; and as it must always have been of such quality, it followed that this quality could not be created by any modern agreement. The several clauses in the act of parliament did not mean, that because the original estates were in their tenure customary, therefore the allotted estates should follow the same tenure and be customary too; but that where there happened to be any settlement or conveyance then subsisting, of the lands in lieu of which the allotments were made, whe-

ther such settlements, &c. might have carved out estates for life, in tail or in fee, such settlement or conveyance should affect the lands allotted, as well as the original estate: in short, that the allotments should be subject to the old uses; and *per* Le Blanc, J.—

The clause in the act, that nothing therein should tend to defeat the lord's seignory, merely reserved to him the same rights over the freehold land, now become the freehold of the tenants, which he before enjoyed as lord over the same land when it was his own freehold.—Bayley, J., was of the same opinion. The act was not meant to interfere with the tenure of the lord and the several persons to whom the several allotments were made, but merely to regulate the interests of the several persons as to the course or channel in which the allotments should go; and as to the proviso in favour of the lord, he conceived no royalty or seignory incident to the

manor would at all be interfered with, by holding that the several tenants took a freehold interest in the lands in question.¹

And the copyholder is not only entitled to the freehold of the allotment, but to the freehold in fee-simple, with all mines, quarries, &c. under the same, notwithstanding there be a clause in the act, that the inclosure shall not "defeat the lord's seignories incident to the manor."² Provision, however, is now usually made in inclosure acts, declaring that the lands allotted in lieu or respect of copyhold tenements or rights of common, shall be of copyhold tenure, and subject to the same customs, and pass by the same conveyances and no other, as the lands, in respect of which they are allotted, are subject to and pass by.

Hence a copyholder may be qualified to

¹ Doe v. Davidson, 2 *Maule & Selw.* 175.

² Townley v. Gibson, 2 *T. R.* 701.

vote at a county election in virtue of his allotment, although he is not entitled to that privilege by his more ample estate of copyhold.

The recent cases¹ have rendered it clear that a special custom is necessary to enable a lord of a manor to demise the waste portions of his demesnes by copy of Court-Roll. But though there be such a custom, the lord, it is conceived, cannot demise by copy an allotment made to him in respect of those demesnes; for the allotment is freehold, and the customs of the manor have not attached on it from time immemorial. Yet some specious arguments on the ground of substitution may be advanced in favour of such a demise.

¹ *Rex v. Warblington*, 1 *T. R.* 242. *Northwick v. Stanway*, 2 *Bos. & Pul.* 346. *Steel v. Prikett*, 2 *Star.* 470. *Badger v. Ford*, 3 *Barn. & Ald.* 153.

CHAPTER III.

Of the clause communicating to the allotments the title of the lands in respect of which they are allotted; and herein of a will dated between the act and award, and general words devising the right of common.

THIS clause is worded in different acts with different degrees of intensity. In the earlier acts it is merely stated that the lands allotted shall be held to the same uses as the lands in lieu of which the allotments are made. In some acts it is omitted altogether; and as there is no provision of a similar import in the general act, very considerable difficulty must ensue from that omission. Cases so circumstanced will probably receive a favourable consideration in a court, and the allotments may perhaps be treated as a new acquisition

unincumbered with any previous title but that which is derived through the act itself, and the omnipotent power of parliament. The right to the allotment may be estimated and determined by the right to the hereditament in respect of which the allotment is made; not so as to communicate the prior title of the hereditament to the allotment, but only to ascertain the person to whom the allotment ought to have been regularly made. This, however, is mere conjecture, which should not be indulged in.

The modern clause may perhaps be considered sufficiently ample. “ And be it further enacted, that the several allotments which shall be made by virtue of this act, and the premises so to be exchanged, partitioned, and divided as aforesaid, shall, immediately after the making of such allotments, partitions, and exchanges respectively, go to, be, remain, and enure, and be held and enjoyed, and the several persons to whom the same shall be:

long, shall from thenceforth stand and be seised and possessed thereof respectively, to such and the same uses, and for such and the same estates, and subject to such and the same leases (except leases at rack rent of any part or parts of the said common field lands so intended to be divided as aforesaid, which are hereinafter declared to be void), wills, entails, limitations, remainders, tenures, rent-charges, quit-rents, services, mortgages, charges, liens, judgments, and other incumbrances as the several lands and grounds, in respect whereof such allotments shall be made, or which shall be so divided, partitioned, or exchanged in pursuance of this act, now are, or should, or would have been subject and liable to, have been charged with, or affected by, in case this act had not been made."

The interpretation of this clause with respect to a will made in the interval between the act and the award, devising rights of com-

mon which at the testator's death have been converted into allotments, has been the subject of considerable discussion. In a case submitted to Mr. Wilbraham, on the Hexham Inclosure Act, which passed in 1753, it was declared by the act that the allotments should be held and enjoyed by the persons to whom the same were allotted, "in the same manner and by the same tenure as the respective lands in right of which the said allotments should be made." A person having a copyhold close held of the manor of Hexham, to which was appurtenant the right of grazing cattle in two large commons, the subject of inclosure, by her will, dated January, 1755, devised the said close with the appurtenances to certain persons therein named. The award was dated in May of the same year, and allotted to the testatrix certain lands in right of her copyhold close and rights of common in the moors and wastes of Hexham: the testatrix died in 1756 without altering her will,

and the question was, whether the allotment passed to the devisee.

Mr. Wilbraham was of opinion, that as the testatrix was not seised of the lands at the time she made her will, they did not pass thereby; for though she was seised of the common as appurtenant to the lands when she made her will, and though the lands were substituted in the place of the common, yet they could not pass as appurtenant to the lands, since they were a corporeal inheritance, and one corporeal inheritance could not be appurtenant to another. But as the testatrix lived till after the lands were awarded to her, and as these lands therefore were as a new acquisition to her, the learned gentleman inclined to think that she could not devise them by a will made before they were awarded to her. “ Besides, as it seemed to be copyhold, being by the act of parliament of the same tenure that the common was, which was appurtenant to copyhold, these lands could not

pass by the will, but descended upon the [customary] heir at law.”¹

On a question of the same kind arising under the Boston West Act,² Mr. Butler wrote as follows: “In many cases where several instruments taken together operate as one assurance of lands, a devise made in the interval between the execution of the first and the completion of the last instrument, will be valid; and on this ground it is open to contend that the act and the award form but one instrument, and that the latter relates back so far to the former as to give validity to the intermediate devise. •

¹ 2 *Ca. & Opin.* 312. As to the latter position, see the 2d Chapter of this tract.

² This act contains a clause communicating the title of the old inclosures to the lands allotted, but that clause could not have been mentioned to Mr. Butler, as is evident from the whole tenor of his opinion.

“Mr. Wilbraham (to whose opinion as above stated, the learned writer had probably been referred,) does not take notice of this circumstance, but as he was a consummate lawyer, and wrote his opinions with much deliberation, it is not to be assumed that it escaped his attention. Viewing the case in this light, the question seems to be, whether the testator at the time he made his will, had that inceptive seisin in the allotment which the law allowed him to devise. It is admitted, that a devise of a contingent remainder is valid.¹ That, perhaps, is the nearest approach of legal authority to the present case, but it differs materially from it;² and I am of opi-

¹ Alluding possibly to the cases of *Selwin v. Selwin*, 1 *W. Black.* 251. 2 *Burr.* 1131. *Roe v. Jones*, 1 *Hen. Black.* 30. *Fearne, C. R.* 537.

² A contingent remainder-man has an interest in the lands at the time of the devise; that interest is descendible, and is very distinguishable from a mere possi-

nion, on the ground I have suggested, that the devise of the allotment cannot be supported; and I concur with Mr. Wilbraham in opinion, that as the allotments are new acquisitions, they did not pass to the devisees, but descended to the testator's heir at law." 1818.

The two essential requisites to a perfect devise are, that the party be seised of the estate at the date of his will—and also at his death. In most of the cases that have occurred, involving the doctrine of revocation, the testator has been well enough seised at the date of his will, but some alteration in his circumstances, or some dealing with the property has taken place between that period

bility or hope of succession. The vesting of the remainder, then, after the date of the will, can scarcely be said to amount to a new acquisition; which the realization of a bare expectancy would certainly be. This is assumed to be the difference alluded to in the text.

and his decease, from which an intention to revoke the will has been manifested. A bare mutation, however, of the quality of the estate, without some actual change of ownership, or some evidence of an intention in the testator to revoke, has never been held alone sufficient to repeal the devise.

If the testator be disseised¹ after the date of his will, and before his death re-enters, whereby he is remitted to his former estate, the interest which he takes by remitter cannot be viewed in the light of a new acquisition, so as to prevent its being predicated of him, that he had the same estate at his death as he had at the date of his will. An alteration, however, has taken place, but without the consent of the testator ; and consequently, no intention in him to revoke can be inferred from this circumstance, nor will a revocation ensue.

¹ Attorney General v. Vigor, 8 Ves. 282.

In this instance, a change takes place in the quality of the estate without any change in the ownership.

On the same principle, a will devising the equitable interest is not revoked by a conveyance of the legal estate;¹ but to preserve the permanency of the will, the legal estate must be conveyed to exactly the same uses as previously existed in the equitable interest; for if after such conveyance, the testator be found in possession of an estate, the least modified in point of quantity or duration of interest from that which he had antecedently, the latter essential to a perfect devise will be wanting and the will be abrogated.²

¹ *Williams v. Owens*, 2 *Ves. Jun.* 595.

² If a tenant in tail, with remainder to himself in fee, makes his will and levies a fine, the effect will be to bar the entail and accelerate the reversion into an estate in possession. Consequently, the general position that a fine

So in reference to partition, it is now settled that mere partition, whether by compulsion or agreement, will not alone amount to a revocation of a will; but the slightest addition, as a power of appointment prior to the limitation of the uses, will be sufficient to annul the existing devise.¹ This is a stronger case, and less reconcilable with principle,

operates as an absolute revocation (*Vawser v. Jeffery*, 2 *Swan*. 273.) must receive this qualification, that it will not so operate when levied by a tenant in tail, but only when levied by a tenant in fee. The tenant in tail is seised of the same reversionary estate at the date of his will as he is at his death, the only alteration effected in that estate by the fine, is to convert it into an estate in possession. But the operation of a recovery under similar circumstances is obviously different, as the effect of that instrument is to bar the reversion, and enlarge the entail into a newly acquired fee, which must consequently annul the will. 3 *Pr. Wms.* 165. *Goodtitle v. Otway*, 1 *Bos. & Pul.* 612.

¹ *Luther v. Kirby*, 8 *Vin. Abr.* 148. 3 *Pr. Wms.* 169. *Knollys v. Alcock*, 7 *Ves.* 564. 8 *Ib.* 281.

than either of the former; for as to one moiety at least, there does appear something very much like a new acquisition, particularly with reference to a partition of a tenancy in common. The point, however, as above stated, has lately been acknowledged by the Lord Chancellor.

The case of an exchange approaches nearer, in one sense, to the subject in review than any of the preceding. In a late case it was resolved that a devise was revoked by an exchange, though the land after the death of the devisor was restored to his heir, under an arrangement, in consequence of a defect discovered in the title of the other party to the exchange.¹ The difference between a revocation arising from a disseisin and an exchange is, that in the case of disseisin the revocation is not the act of the party; it is against his will. If he be disseised before

¹ Attorney-General v. Vigor, 8 Ves. 282.

the execution of his will, nothing will pass, as a right of entry is not a subject of seisin, and cannot therefore be devised. But if he has the land at the date of his will, and is disseised afterwards, he will, if he be re-mitted to his old title by entry, be seised of the same estate at his death as he had at the date of his will, and the disseisin not being an act of his own, the devise will remain unrepealed.

An exchange, however, is an act of his own volition, and though he should afterwards take the same estate back again by reason of some defect in the title, the devise will be considered entirely cancelled by the manifest intention at the time of exchange to alter the use in the land; and the non-accomplishment of that intention will not resuscitate the devise, as is evident from a void bargain and sale being held alone sufficient to destroy the will.¹

¹ 1 *Roll. Abr.* 615. 3 *Atk.* 73, 803. 8 *Ves.* 282.

To apply these principles to the question under consideration, it is observable, that in the case of an exchange, the testator manifests a decided intention to alter the ownership of the land ; and as to the land taken in exchange, the will cannot operate vicariously to pass an estate at A. by the description of an estate at B., particularly when the testator *by an act of his own* has substituted the one estate for the other. If he had sold the estate comprised in his will, and purchased another estate, it is clear the will would not have operated on the newly acquired lands.

The case of an exchange must be viewed in the same light. That the allotment is in itself a new acquisition, will not, it is conceived, be denied. If the description in the will refers peculiarly to rights of common, it cannot be contended that several acres of land are included in that description. The cases, it will be perceived, have uniformly

established the principle that the testator must be seised of the same estate at his death as he had at the date of his will ; and the object has been to ascertain whether the estate of which the testator dies seised, is really and substantially the same as that which he had when he sat down to make a testamentary disposition of his property.

But in all the cases where there has been an actual change in the subject of devise, as distinguished from an alteration in the quality of estate in that subject, a revocation of the will has been pronounced inevitable, for want of compliance with the two grand requisites above alluded to ; and it will also be observed, that the same consequence has ensued, whether the change in the subject of devise has been effected with or without the consent of the testator. If he be disseised and does not revest the seisin by entry before his death,—at the date of his will he has the seisin, at his death a right of entry ; and this

against his consent : but not having the same estate at both the before-mentioned periods, the will is annulled. This shews that the intention is not referred to in cases where these preliminaries are wanting. The subject in dispute presents the converse of the case in disseisin. At the date of the will the testator has a right of common, at his death he has the seisin of land, the one arising from and substituted for the other ; and this without his consent, by virtue of an act of parliament ; certainly without his consent, for he has no option to reject the allotment and preserve his right of common. A similar consequence should then follow—the will should be, and without a doubt will be determined to be inoperative.

From these premises it is concluded, that on the ground of substitution merely, an allotment will not pass by a will dated between the act and the award, without an express provision in the act to the contrary. The only

other question is, whether the award is to be considered as relating back to the date of the act, so that the party may be said to be seised of the allotment at the date of his will, as well as at the time of his death. It is evident that this construction, even if it can be supported, will not apply to a will which affects to dispose of rights of common only and not the land itself.

But supposing the will to contain general words applicable to property of a corporeal nature, it is not clearly settled that the doctrine of relation will so far vest the estate in the recipient, as to make him absolute owner in the interval between the date and perfection of the instrument conveying the estate.

In the instance of a will made between the date of a bargain and sale conveying the property to the testator and the enrolment of that bargain and sale, the question arises, whether the testator can be said to be seised of the

estate at the date of his will, if he dies before enrolment, supposing the enrolment to take place within due time afterwards. Jones, J. conceived that in *rei veritate*, the *bargainor* is seised until the enrolment; for until the words of the statute¹ be complied with, *viz.* "that the deed be enrolled," nothing passes to the bargainee; and he cited the case of *Bellingham v. Alsop*,² where it was held, that if a bargainee before enrolment, bargains and sells the land to another person before the enrolment of the first bargain and sale, and then both instruments are enrolled consecutively, the second bargain and sale will be void, because there is nothing in the secondary bargainor at the time of the bargain and sale; and of that opinion was Hyde, C. J.; but Croke, J. conceived that if the enrolment be made within the prescribed time, the bargainee will be in *ab initio*; for the statute of uses is to be considered as executing the pos-

¹ 27 Hen. 8. c. 16.

² Cro. Jac. 52.

session to the use at the date of the deed, and therefore the bargainee will be in as from that period.¹

On the other hand it is observable that a fourth resolution in *Joham v. Morrice*² was, that where a bargainee after the execution of the indenture of bargain and sale, but before enrolment, lets the land for years, and the indenture is enrolled within the six months, yet the lease is void, and *the relation of that enrolment shall not make it good.*

However, it is considered clear from other adjudications, and particularly from *Dimock's* case,³ where the *heir* of the bargainee was adjudged entitled to lands conveyed to his ancestor by bargain and sale enrolled after the ancestor's death; that the *devisee* will be held

¹ *Flower v. Baldwin*, *Cro. Car.* 218.

² *Cro. Car.* 110.

³ *Hob.* 136.

entitled to lands under a will made in the interval between the date of the bargain and sale and its enrolment; for that the estate vests presently by the statute of uses, and not by the statute of enrolments, except where the bargain and sale is made by commissioners of bankrupt, as in that instance nothing vests till enrolment.¹

From this digression it should appear, that the devise takes effect in the case lastly alluded to, not under the doctrine of relation, but by reason of the statute of uses vesting the estate in the bargainee as from the date of the deed, whereby the testator is in fact

¹ *Bennett v. Gandy*, *Carth.* 178. By the late Bankrupt Act the enrolment of the bargain and sale is left to the operation of the statute of enrolment, and must consequently be enrolled within six lunar months of its date, otherwise a fresh bargain and sale will be requisite.

seised of the same estate at the date of his will as he is at his death.

If in 1820, lands are conveyed to A. to such uses as B. shall appoint, and B., in 1825, appoints to C. in fee, the appointee in common language may be said to be in as from the original conveyance, but it cannot be contended that C.'s will, dated between the years 1820 and 1825, containing a general devise of all real estate, will attach on the property vested in him by an execution of the power. It is submitted that the act of parliament and award are to be construed in reference to the subject in review, as operating in a similar manner to the deed creating, and deed executing, a power of appointment. The act confers the power,—the award executes it; and though the award is not to be treated as a conveyance, yet it has been lately decided that the legal estate of freehold in the allotment, does not pass until after the execution

and proclamation of the award.¹ These considerations afford strong grounds in support of Mr. Wilbraham's opinion.

If a will be made after the execution of an award, and the words of devise do not pointedly refer to the allotment, but only to a tenement with the appurtenances, it will remain to be proved, whether the allotment was so attached to the tenement in the mind of the testator, as to form an appurtenant to it, in the same manner as a garden, orchard, or small close of land may in an enlarged sense of the word "appurtenances," be construed to be included in a will by that word, although it be a corporeal hereditament. The general rule in these cases is, that land usually occupied with a house, will not pass under a

¹ *Farrer v. Billing*, 2 *Barn. & Ald.* 271; 5 *ib.* 47.
et infra.

devise "of a messuage with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense.¹

If there be a clause in the Inclosure Act subjecting the allotments to the same wills, &c. as exist of the lands in lieu of which they are allotted; and the commissioners, in further aggravation of the evil animadverted on in the former part of this Tract, make one entire allotment to the testator in lieu of two distinct tenements which he has devised to two separate persons; a point of some nicety arises to ascertain what estates and interests the devisees take in the allotments. Do they take as joint tenants, or as tenants in common? Have they equal or unequal shares? The parties should agree upon a division, execute reciprocal conveyances, and covenant to pro-

¹ *Back v. Nutton*, 1 Bos. & Pul. 53.

duce each other's title. This expense is entailed upon them by the inefficient execution of the powers of the act.

In the Snelston Inclosure Act, Derby,¹ is the following very proper provision :—

“Sect. 37. And be it further enacted, that in case the proprietor or proprietors of any lands or other hereditaments, by this or the said recited acts, authorised to be allotted or exchanged, shall hold their respective messuages, lands, or hereditaments for different estates, or subject to different trusts, charges, or incumbrances, the said commissioners, on being requested in writing so to do, shall ascertain and distinguish the messuages, lands, or hereditaments so held; and shall also set out and distinguish the different allotments, or other hereditaments to be accepted and taken

¹ 5 Geo. 4. c. 1. *Pr. Acts*, 1824.

as an equivalent in respect of each of them so circumstanced, and the said commissioners shall, and they are hereby authorised and empowered to set forth and declare in and by their award, in right of what messuage, land, or hereditaments in particular, such allotments shall have been respectively made, and therein also separately describe and ascertain the situation and boundaries of every such allotment."

The sixth section of the general act mentioned *infra* chap. 9, evidently shews an intention in the legislature, that the allotments should be apportioned according to the different holdings, titles, and tenures of the lands in respect of which they are allotted.

CHAPTER IV.

Of the deduction of title to lands exchanged under inclosure acts.

BY the 15th section of the General Inclosure Act, the commissioners are authorized to set out, allot, and award any messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures, within the parish or manors wherein the inclosure is proceeding, in lieu of any other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures within the same parish or manors, so that such exchanges be made with the consent of the owners, or if any ecclesiastical benefice be affected, with the consent of the bishop and patron. Hence,

to authenticate an exchange under inclosure acts, it is proper to call for evidence that the due and proper persons consented thereto, for without such consent, the exchange will not be good within the act, though nominally made under it.

There is not any clause in the General Inclosure Act, communicating a reciprocity of title to the lands given and taken in exchange ; consequently, in the absence of any such provision in the local act, the titles to both estates should, in strictness, be examined in conformity with the general practice, though that practice is not uniformly acceded to.¹ In most local acts, however, a clause is inserted providing that the allotted and exchanged lands shall be affected by the same uses, wills, and settlements as the lands in lieu, or in respect of which they are allotted

¹ *Byth. Ney. Mar.* p. 156.

or exchanged ; in which case it is the prevailing practice to consider lands received under an exchange made in pursuance of an inclosure act, as held under the same title as the lands given in exchange. In the language of a learned writer,¹ "there is a change of land, but not a change of title."

It has been contended that the act itself does not make or constitute a title, or give any right to any party thereto, that he had not before ; but, on the contrary, by a general saving, saves to all persons, except those to whom allotments are made, their former rights ; that exchanges, under the power in this act, are no more than exchanges under powers in any other instrument ; that the act merely gives a power to be executed as any other power, leaving the parties under it to supply and prove their titles ; and that it is

¹ 1 *Pres. Abs.* 162.

a clear point in practice, that a purchaser under an exchange deed is entitled to examine both titles.

With this impression, an eminent conveyancer, whose advice to his grandson is worthy the adoption of every student, thought that a subsequent purchaser of lands exchanged under an inclosure act, should require to be produced, the title of the party from whom the land was taken in exchange. It was, however, the opinion of another eminent gentleman, (and that opinion is certainly conformable to the uniform practice of the majority of conveyancers,) that the title of each party is communicated to the lands taken in exchange exactly in the same manner as allotments of common field lands are, under acts of this description, held subject to the title of the person to whom the allotment is made ; in short, that there is not any conveyance or degree of title effected by the act ; and, con-

sequently, that the exchange is not to be treated as amenable to the established rules.

At common law exchanges can be made within certain limits only, as fee-simple for fee-simple; estate for life for estate for life; estate tail for estate tail; freehold for freehold; legal estate for legal estate; leaseholds for years, for leaseholds of the same *number of years*; copyhold for copyhold of the same manor. But exchanges under powers in inclosure acts are generally considered as not bound by these rules. Thus, lands of freehold tenure may be exchanged for lands of copyhold tenure within the same parish or manor; a tenant for life may exchange with a tenant in fee, provided the remainder-man be not thereby injured;¹ an equitable tenant with a tenant of the legal estate; and a copy-

¹ *Rex v. Flockwood Commissioners.* 2 *Chit. Rep.* 251, *et infra*.

hold tenant with his own lord. But these allotments and alterations of the *possession* of the lands within a parish or manor can scarcely be called exchanges, they are mere substitutions of one piece of land for another, without affecting any exchange or alteration of title or interest. The lands taken in exchange by each person will as to him be of the same tenure as the lands given by him in exchange, and be held by the same services, &c.

The commissioners, however, are not bound to make all the exchanges the parties desire, if, in a conscientious discharge of their duty, they consider the exchange will be injurious to third persons. Under the Flockwood Inclosure Act, one person who had an estate in fee, was desirous of exchanging with another person who had an estate for life. To this exchange, the remainder-man objected, and the commissioners, on his representation as it is assumed, refused to make

the exchange. Both parties then applied to the Court of King's Bench for a *mandamus* to compel the commissioners to effect the exchange.¹ The affidavit of the commissioners stated, that they considered themselves as holding a judicial office; that the exchange was most unfair and prejudicial to the remainder-man; that these exchanges were matter of favour where the estates are of different degrees; and that they could not conscientiously make the exchange required.

It was then contended that the words "shall and may," in the exchange clause of the act in question, were imperative: but the court held, that those words were imperative only when they authorised something for the public good, as a churchwarden to make a rate, &c., but not so in a case like this. The

¹ Such *mandamus* will, it seems, be granted to the commissioners on proper cause, as to inquire if there is any *modus*, &c. *Anon. 2 Chit. Rep. 251.*

word "exchange" imported an equality of interest, and the court would not grant a *mandamus* where a conscientious duty was left to the commissioners and they declared they could not perform the act required. It would be subjecting the consciences of the commissioners to a *mandamus*. How did it appear that this statute was ever intended to allow a commissioner to effect such an exchange as this? It would be most grievous to the remainder-man if they could. The rule was consequently discharged.¹

In regard to copyholds, the freehold lands taken in exchange become demisable by copy of court roll, and the copyholds given in exchange are converted into freehold. The operation of the act is to communicate the copyhold tenure to certain lands in lieu of other lands liberated from that tenure. But

¹ Rex v. Flockwood Commissioners, 2 *Chit. Rep.* 252.

it should be observed that no decision has yet warranted this position as unimpeachable law ; and therefore it is a very proper precaution, though not much regarded in practice, to require inspection of both titles, when such inspection can be easily obtained.

And it should be further noticed, that though the exchange clause in the General Inclosure Act will, in all probability, be judicially interpreted to warrant exchanges of freehold and copyhold lands ; yet considerable doubt hangs about the certainty of that interpretation, as is evident by the insertion in most local acts of a clause expressly warranting such exchanges. These clauses require great attention, as they sometimes fall short of what they are evidently intended to express.

Another rule at common law is, that an exchange cannot be made between more than two parties ; but several persons may com-

pose each party. Thus, A. cannot grant lands to B. in exchange for lands which he is to receive from C.; but tenant for life, tenant in tail, and reversioner on the one part, may exchange with a trustee of the legal estate, and a feme covert and tenant in fee of the equitable interest, on the other part.¹ But this rule of law cannot, on the before-mentioned grounds, strictly apply to exchanges under inclosure acts. The foundation of an exchange at common law, is a mutuality of interest, and an implied warranty, which engenders a right of re-entry in case of eviction. Neither of these principles are applicable to exchanges under inclosure acts, where the object is convenience of occupation and contiguity of possession merely.

Hence it will probably be decided, when-

¹ *Co. Litt.* 50 b. 51 a. 2 *Shep. Touch.* 297, 298. *Pres. Ed.* *Bustard v. Coulter*, *Cro. Eliz.* 902. *Eton Provost v. Winton*, *Bp.* 3 *Wils.* 496.

ever the question shall call for judicial determination, that the commissioners may, by their award, make an exchange as between three persons for the convenience of each; but it would certainly be more formal, and free from all risk of captious objection, if the commissioners could be prevailed on to effect the arrangement without an intermediate allotment to the third party.

CHAPTER V.

Of allotments in lieu of tithes.

THE General Inclosure Act contains no directions on this head. It merely enacts that the incumbent may, with the consent of the bishop and patron, demise any allotment to him by virtue of any future act, for a term of twenty-one years, upon certain conditions.¹ It is necessary to ascertain whether and how far waste and uncultivated lands are exempt from tithes, before we pass on to the consideration of this division of the Tract.

¹ 41 Geo. 3. c. 109. s. 38. amended by 1 & 2 Geo. 4. c. 23. s. 4.

By a statute in the reign of Edward 6th,¹ it is enacted, that *all barren heath or waste ground* which thereafter shall be improved and converted into arable ground or meadow, but which, before the passing of that act, had not paid any tithes by reason of such barrenness, shall, after the term of seven years next after such improvement, pay tithe for corn and grain growing on the same. It has been the subject of some dispute what is the exact meaning of the words "barren heath or waste ground," in this act. Do they refer to lands which are *suapte natura* barren, or to such as have become so in consequence of the negligence or ill husbandry of the occupiers? Do they include the waste lands which of late years we have been accustomed to see productive of such plentiful harvests, or only such as will not yield a profit for the first

¹ 2 & 3 Edw. 6. c. 13. s. 5.

seven years without great expense and labour? Is the test, a natural inaptitude in the land for tillage, or is it the expense the land will require to bring it into a fit state of cultivation? The courts have fixed on the former criterion for the decision of this question.

For example, Howburn Bog in Durham was, at the time of inclosure, so spongy, hollow, and wet, that no cattle could go on it without being lost, and when it was drained, ploughed, and sown, it could not be harrowed by horses, but by men only; the crops turned out mean and bad. Eyre, Baron, sitting for the Chancellor, dismissed the bill for tithes, with costs, on the ground of the natural unfitness of the land for agricultural purposes; for what, asked the learned Baron, could be barren land, if that were not so, where no cattle could tread or no plough could go?¹

¹ *Byron v. Lamb, Gwill. Ti. Ca. 1595.*

Lord Hardwicke has said, that if the land is in its own nature so barren, as not to be fit for agriculture after it is improved, it shall not pay tithe; but if in its own nature it is fit for tillage, but by reason of weed or other accidental circumstances, it was not turned into tillage before, upon the taking away of that accidental circumstance, it shall pay tithes presently on being turned into tillage.¹ To this position the Court of King's Bench in a late case agreed;² but Lord Hardwicke went on further to state, that "if an additional expense is necessary to make the land produce the first crop, yielding a profit, seven years shall be allowed."

Lord Ellenborough, however, has objected to this statement of the law, for that in all the cases in which the statute had been held to

¹ *Stockwell v. Terry*, 1 *Ves.* 115.

² *Warwick v. Collins*, 2 *Mun. & Setw.* 349.

apply, some great and extraordinary expense had been incurred. The proper inquiry, said Lord Ellenborough, was whether the land be of such nature as to require *extraordinary* expense, either in manure or labour, to bring the land into a proper state of cultivation; but for the position, "that if any *additional* expense is necessary to make it produce a first crop *yielding a profit*, seven years shall be allowed," there was not any dictum or decision to be found in any of the books.¹ In a subsequent stage of the same cause, the court held that land, which is of a good natural quality, must pay tithe immediately, although the expense attending the breaking it up and liming it, exceeds the return made to the farmer in the several first years of cultivation.²

¹ 2 *Mau. & Selw.* 349.

² *Warwick v. Collins*, 5 *Mau. & Selw.* 166.

Hence it should follow that an allotment can seldom be pleaded as exempt from tithes ; for the land would scarcely be inclosed if it were unproductive ; and at common law, even barren land bearing any fruit, is titheable.

Agistment tithe is a sum equal in value to the tenth of the grass or herbage consumed by cattle not kept for the plough or the pail within the same parish.¹ Consequently a person taking in cattle to tack, is liable to pay an agistment tithe for them, even though the cattle belong to a person paying tithe for them within the same parish ; for agistment tithe arises, not in respect of the ownership of the cattle, but in respect of

¹ *Byam v. Booth*, 2 *Price*, 231. *Ellis v. Saul*, 1 *Anstr.* 332. 3 *ib.* 761. *Gwill.* 1445. 2 *Inst.* 651. *Bunb.* 446.

the occupation of the land, and may accrue due for the same place several times in the same year.¹

Common appurtenant or appendant is considered, in law, to be part of the farm or land to which it belongs, even though it confer a right to depasture lands in another parish;² now if the tenant of the land were titheable for the common, the parson would be invested with an unreasonable profit; for the cattle which depasture commons yield an increase to the parson from the produce of their wool, milk, lambs, &c. as of common right, and if they were to be tithed again for the value of their keep on the common, the parson would receive a double tithe, which the law will not tolerate.

¹ *Bunb.* 3. 3 *Burn. Ecc. Law*, 448.

² *Lambert v. Cumming*, *Bunb.* 138. *Ellis v. Fermor*, *Gwill.* 1022.

Agistment tithe, therefore, cannot be claimed for common appendant or appurtenant. But common, in gross, is a distinct inheritance, and an agistment tithe will accrue in the exercise of it, notwithstanding it belongs to a person paying rectorial tithes for the same cattle within the same parish; for the right is annexed to the person and not to the land, and the tithe arises in respect of the occupation, which cannot be varied by the circumstance of the commonable cattle paying a rectorial tithe to the same parson.¹

By the inclosure act, the right of common is extinguished, and the allotment becomes a separate inheritance, neither appendant nor appurtenant to the farm, for it is now a cor-

¹ These positions flow more from general principles than from direct authorities, but they are supported by *Gwill.* 1027. *Hatfield v. Rawlins*, *Gwill.* 1030. *Toll.* Ti. 38. 89.

poreal hereditament existing *per se*, and as such, liable to a rectorial tithe, unless an exemption can be shewn under the before-mentioned statute, or by some other means.¹ The allotment, however, so far participates of the liabilities and privileges of the right in lieu of which it is made, that if an estate having common appurtenant, be exempt from all tithes, the allotment in respect of the common will also be entirely discharged of that incumbrance; for as no tithe was payable before the inclosure, in respect of cattle feeding on the common land, no tithe should be payable in respect of the land allotted to the owner of the estate in lieu of that right of common.²

¹ *Moncaster v. Watson*, 3 *Burr.* 1375. 1 *W. Black.* 402.

² *Steele v. Manns*, 5 *Barn. & Ald.* 22. *Stockwell v. Terry*, 4 *Burr.* 1377. 2 *Burn. Ecc. Law*, 388. 1 *Ves.* 115. *Bunb.* 138. *Gwydir v. Foaks*, 7 *T. R.* 641.

But it is otherwise, with reference to common in gross, as the only tithe that species of common can produce, is an agistment tithe; and if the common were exempt from this tithe, the allotment would be still liable to rectorial tithe by common right, from which nothing could exempt it, as that tithe never previously existed, and consequently could not be the subject of exemption. Such, at least, appears to be a fair inference from the preceding observations, though the books do not go to the full extent of the position.¹

The exemption, however, must be of all tithes, or at least of such tithes as the commons could be supposed to produce, otherwise the allotment in lieu of the common will not be exempt. In a case before Lord Mansfield, the owner of a farm, to which a right of

¹ Some such doctrine seems hinted at in *Mirch. Ti.* 50. 2d ed. citing *Rex v. Fox*, *Gwill.* 1027., but the reasons are not detailed.

common was appurtenant, claimed to be exempt from tithes of corn, grain, and hay, in consideration of keeping in repair the north end of the parish church. An inclosure of the commonable lands in the parish took place, and a question arose, whether the allotment in respect of this farm was exempt from tithe of corn, grain, and hay. It was resolved by the Court of King's Bench that it was not exempt, on the ground that the common in lieu of which the allotment was made, could not, whilst it was common, have produced either corn, grain, or hay, therefore it could never have been exempt from tithes in respect of those articles. The only tithe the common was capable of bearing, was tithe of wool, lambs, milk, &c., from which the common in question was not exempt. The allotment was therefore adjudged liable to tithe, and the postea delivered to the plaintiff, the impropiator.¹ Hence, the allotment will not be

¹ *Moncaster v. Watson*, 3 Burr. 1379.

free from tithe, unless the exemption be of mixt as distinguished from predial tithes.

In a case which occurred in practice, a rector let the tithes of his parish to A. B. In the parish were certain open and waste lands, wherein the several parishioners paying tithes, had rights of common. Those commons being inclosed by act of parliament, a question arose whether the lessee was entitled to the rectorial tithes in respect of the allotments. A slight attention to the foregoing distinction will shew at once, that the lessee was without title. The tithe of commons comprised in his lease was in the nature of an agistment tithe; the tithe arising from the allotments was a rectorial tithe not in existence when the lease was made, and could not, therefore, be the subject of it; under this impression it was advised that the tithes of the allotments were payable to the rector and not to his lessee.

Another question arose under these circumstances : a parish was divided into two hamlets, A. and B. The rector let the tithes over the hamlet A., to a person having lands within that district. The lessee, under an inclosure act, exchanged his lands in A. for other lands in B. The question was whether, under the substitution clause in the local act, the lessee was not entitled to an exemption from rectorial tithe, in respect of the lands in B., during the continuance of his lease. It was considered that the inclosure had not made any alteration in the tithes ; but that the lands received in exchange were titheable in kind to the rector notwithstanding the lease, whilst the lands given in exchange were subject to the payment of tithes to the exchangor as lessee.

Under modern inclosures, the *tithes of the whole parish* are usually provided for by allotment. The commissioners are empowered to set out an allotment in respect of the glebe

lands of the incumbent, and any rights of common which he may enjoy ; and then not uncommonly to allot to the tithe owners, a certain proportion of land to be estimated according to a given ratio, in lieu of all the tithes within the parish, which allotment they are directed to divide and apportion between the impropiator and rector. The ratio is usually one-fifth for all old inclosed arable lands, and one-eighth for all old inclosed pasture lands, and one-ninth for all open and common field or waste lands within the parish subject to the payment of tithes. The advantage then is, that all lands in the parish are tithe free ; and this advantage the several proprietors should take into consideration before they complain (as they not unfrequently do) of the smallness of their allotments, in comparison with the tract of waste land divided.

The Atterby Inclosure Act, 9 Geo. 3. c. 51, (1769,) directed that the commissioners

should allot to the rector and his successors, in lieu of the tithes within the townships of A., B. and C., so much of the lands to be inclosed as should (quantity, quality, and situation considered,) contain, or be equal in value to two-fifteenth parts of the titheable places in the said townships; and that after the enrolment of the award containing such allotment, all tithes within the said townships should cease. The commissioners made an allotment of three hundred and twenty-six acres to the rector, in lieu of all tithes within the townships of A. and B., which was more than two-fifteenths of the titheable lands within those districts, but less than that quantity by one hundred and forty acres, taking into consideration the township of C.

The award was duly enrolled; and nearly fifty years after, a succeeding rector claimed rectorial tithes in respect of the lands within the township of C., on the ground that the allotment having been expressly made in lieu

of tithes within the townships of A. and B. only, it was no bar to the rector's claim for tithes in the township of C. The short question made by his counsel was whether, when the commissioners made an allotment in lieu of the tithes of A. and B., but made no allotment in lieu of the tithes of C., the Court would consider their award as a bar to the tithes of C.? It was contended that the Court could not so consider it, for the commissioners had in effect declared that the allotment should not be taken as a compensation for the tithes of C., since they had expressly declared it to be a compensation for the tithes of A. and B. only. No such award, therefore existed, as was required by the act; and the existence of such an award was a condition precedent to the operation of the act in extinguishment of the right to tithes.

Sir T. Plumer, M. R. (for whose remarks on the interpretation of inclosure acts in general, this case is here introduced) observed,

that the circumstances presented three distinct questions. 1st, Whether it is competent to the rector, fifty years after the inclosure, to inquire into the propriety of the allotments. 2nd, Whether he has proved that the award is not such as the act proposed, that is, that the allotments are not such as the rector was entitled to receive. 3d, Whether, if he establishes both those propositions, the consequence is, that the award is invalid.

“It is not necessary,” continued his Honour, “to examine the first question. Admitting for the present the competency of the rector to inquire into the propriety of the allotments, has he shewn sufficient to impeach the judgment of the commissioners? It appears that an allotment of about three hundred acres was made to the then rector,—was accepted by him,—and has been enjoyed by his successors ever since; and that the quantity of that allotment was the subject of inquiry and adjudication by the commis-

sioners. A court reviewing the judgment of any legitimate tribunal, is bound to presume *omnia rite acta*, much more when that review is undertaken after the lapse of half a century. It is sufficient for those who rely on the judgment to produce it; it cannot be impeached without clear and indisputable evidence of error. The commissioners are authorised to adjudicate finally on the subject of quantity, quality, liability to tithe, &c.; those points they must have considered, had they duly exercised their power; and I am bound to suppose them so to have done, and to give them credit for a just adjudication. Nor can it be supposed, that the then rector failed to submit to their consideration whatever was required for enabling them to assign to him a proper allotment.

“ But it is said that the impropriety of the allotment is in proof; that by computation it is deficient in quantity to the extent of about one hundred and forty acres; that in the

award no reference is made to the tithes of C., and therefore if any lands there were titheable, no compensation having been given for them, that the rector has not received the indemnity provided by the act. I have anxiously considered, whether it is possible now to determine that the rector had or had not a due allotment. In description, on the face of the award, there is no reference to the tithes of C. ; it cannot, however, be said, that no regard was had to that township, for an allotment is expressly made of lands inclosed there in respect of the *Carr-side* pasture [being glebe lands for which a separate allotment was directed]. But in quantity there seems a deficiency. The allotment to the rector was more than two-fifteenths, omitting C., but less than two-fifteenths, including that township. If quantity is the criterion, there is certainly error ; but how does it appear that the deficiency in quantity was not compensated by superiority in value ? Or, how can it be known what evidence was produced to shew which of the

lands included were titheable, and which not? On that subject we can only conjecture; but this we know, that the allotment was made,—was accepted by the rector,—and has been constantly acquiesced in since, without dispute, till the institution of the present suit. On this question then, I am obliged to say, that the rector has not, by clear and satisfactory evidence, impeached the judgment of the commissioners and shewn error in the award.

“Had it depended on that point, a question might arise what course should be pursued; but I have never entertained a doubt, that under this claim there is no necessity for adverting to that part of the case, being clearly of opinion, *that if an error were proved in the omission of a proper allotment, yet, on the construction of the act, the bar which it creates is insuperable.*¹ It is an independent

¹ The words of the act were, “And the several allotments and divisions, and all orders, directions, regulations,

substantive bar to the claim of tithes in kind for ever ; not conditional, but positive. The legislature has declared, that after a certain event tithes shall cease ; what is that event ? The enrolment of the award. From that time the tithes are extinguished. The proposition of the rector is, that the bar does not arise if he can shew error in the award. That argument confounds two things perfectly distinct ; the existence, and the justice, of the award. The act designed not to leave to the parties the right, at any future time, to question the adjudication of the commissioners, but declared it final and conclusive.

and determinations made as aforesaid, and declared in the award, shall be binding and conclusive upon all the parties interested ; and immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments, of what nature or kind soever, arising, renewing, increasing, payable or happening within or out of the lands and grounds thereby directed to be enclosed, or within the said ancient enclosed lands or grounds, or otherwise, howsoever, shall cease and for ever be extinguished."

“Consider the consequence of a contrary decision. Under the act the award cannot be bad as to the rector, and good as to others. In order to succeed, he must shew that there is no award enrolled ; for if there is, his case fails. It is quite clear, that whatever error there might be in the previous allotments, the existence of the award concludes the question. On this ground, it appears to me, that the defendants have completely succeeded in establishing an imperative and decisive bar to the rector’s claim.” His Honour therefore, dismissed the bill, but without costs, as the apparent deficiency of quantity, and a former submission of the defendants to pay tithes in kind, justified the rector in the institution of this suit.¹

The rector not being satisfied with this decision, obtained an order from the Lord Chancellor to try the question in the court

¹ *Cooper v. Thorpe*, 1 *Swan*. 106; 1 *Jno. Wils.* 55.

of King's Bench, in an action against the defendant, an occupier of land in the parish of C., for not setting out the tithe thereon. The case was tried at the assizes, and the above-mentioned facts proved. The jury found a verdict for the defendant. The Court above was now moved for a new trial, on which occasion the Lord Chief Justice delivered his opinion as follows :—

“ I am of opinion, that in this case there ought to be a new trial. The case may be considered as comprehending three points: First, whether the commissioners were required by the act of parliament to make an allotment to the rector in respect of tithes in C. That is a question of law. Secondly, whether they have done so, that is a question of fact; and thirdly, supposing the commissioners have not made an allotment in lieu of tithes, whether the rector is barred from now claiming the tithes in kind.

“ As to the first point it is clear, and indeed

it is not disputed, that the commissioners were required to make an allotment to the rector for his tithes in C. Then have they done so? In my opinion there is nothing in the award to shew that the commissioners allotted any thing to the rector in lieu of his tithes in C. Then, according to the rule of construction, *expressio unius est exclusio alterius*, we must say, that upon this award they have not done so. I do not enter into the question of numerical calculation, because we cannot thence draw any conclusion that the commissioners intended to include in their award a compensation for the tithes in C. It may perhaps be asked, how could the commissioners omit to award to the rector a compensation in lieu of his tithes in C. In reading the case, it is perfectly clear how that happened. It appears that before the passing of the act of parliament, the rector had agreed to accept in lieu of tithes a composition of 94*l. per annum* from the occupiers of other land in the township of C. Now, the commissioners probably thought

that was an agreement binding the rector to accept from the parishioners that sum in lieu of all his tithes in C., and that they should, by allotting land to him in lieu of tithes, pay him twice over. Now this explanation fortifies the conclusion that it was not intended to include in the award any compensation for the tithes in C.

“ Then the third question is, whether the rector is barred. I should be sorry to find that he was, for in that case the act of parliament would work great injustice, for the rector would be deprived of his rights without receiving any compensation. By the saving clause, which was not adverted to when the case was before the Master of the Rolls, there is saved to all persons, bodies politic or corporate, their heirs and successors, (other than except the persons to whom any compensation shall be made by virtue of the act, in respect of the interest or property for which such allotments or compensation

should be made,) all such estate and interest as they or any of them had and enjoyed, of, in, to, or in respect of the said fields, common pastures, carrs, and waste grounds, or any of them, before the passing of the act. The rector, therefore, not being a person to whom any allotment was made in respect of the interest or property in the tithes of C., is not barred by the statute. That being so, I am of opinion that there ought to be a new trial. Bayley and Holroyd, Js. concurred, the rule for a new trial was made absolute.”¹

On this adjudication a few observations are with great deference suggested. In *Alton Woods’s*² case, it is laid down, that a saving clause in an act of parliament which is repugnant to the body of the act, is void, and in other cases it has been held that the general

¹ *Cooper v. Thorpe*, 4 *Barn. & Cress.* 36.

² 1 *Co.* 47 *a.*

saving clause in a private act of parliament, shall not control the provisions contained in the body of the act, but must be so expounded as to be rendered consistent with the body of the act, or else be void.¹

In *Riddle v. White*,² a similar question to the one here mooted, arose on the Lancaster Inclosure act, 13 *Geo. 3*. By that act it was enacted, that the commissioners should, after setting out thirty acres to the curate of Latley, divide the residue of the moors, waste lands, &c., among the several other persons having rights of common thereon, and that all allotments should be held subject to the same species of tithes only, in the same manner, and to the same persons, as they were accustomed to pay. It was further declared, that the said com-

¹ *Wood v. Cecil*, 2 *Vern.* 711. *Westby v. Kiernan*, *Amb.* 697.

² 4 *Gwill.* 1378.

missioners might sell so much of the said moors or commons as they should think fit, to realize money to pay the expenses attending the obtaining and executing the act, and that the persons who should become purchasers of the said lands so to be sold, should hold the same *discharged from the payment of all manner of tithes*, and other estates, rights, and duties whatsoever to any person or persons politic or corporate. The act saved the rights of all persons other than the persons entitled to a right of common in or upon the said moors or commons.

The impropriator of the parish of Lancaster, some years after the passing of this act filed his bill in the court of Exchequer against the defendants, who were purchasers of the allotments sold under the act, requiring a discovery of the tithe which had arisen during those years ; and praying an account of such tithes, and that the defendants might be decreed to pay the amount thereof to the

plaintiff. For the defendants it was contended that the plaintiff's right as impropiator was not saved by the saving clause in the act: because it saved only rights of, in, to, or out of the moors or commons; and a right to tithes was not a right of that description, and that it would be very hard on the defendants, if they were compelled to pay tithes for lands which they had purchased upon the faith of an act of parliament declaring that they were discharged of tithes.

The Lord Chief Baron thought it impossible to say that the rector was entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the act, which the legislature never could intend. This case was, in point of principle, precisely the same as in *Vernon*. In private acts, in general, the legislature did nothing more than enable persons to enter into a contract, who could not otherwise enter into it; and the per-

sons who are parties to the act, are expressly named in it: but here the legislature does a great deal more, it takes on itself to act on the land and to declare that it shall be *discharged* of tithes; accordingly, therefore, to the principles of the decided cases, and indeed of common sense, his Lordship and the whole court thought that the rector could not claim his tithes against the express words of the act, and disallowed a demurrer thereupon accordingly.

- In *Cooper v. Thorpe*, the saving clause as above interpreted, appears incompatible with the section of the act relied on by the Master of the Rolls. In the Atterbury Act, the persons exempted from its operation are those to whom allotments have not been made in respect of some interest or property which such persons might lawfully claim in the subject of inclosure. By the section in the body of the act, all allotments, directions, &c., (whether founded in mistake or other-

wise), are most definitively declared to be binding and conclusive on all *parties interested*. The rector of C. for the time being, was clearly a *party* interested within the meaning of this section, for he was named in the preamble, and received more than a proportionate allotment if his present claim were not taken into consideration. Might not the language of the Lord Chief Baron, in the case of *Ridley v. White*, be fairly applied to this case, that if the rector is entitled to the tithes claimed it will be in his power to defeat the purposes of the act, which the legislature never could intend. After the award, all manner of tithes in the lands inclosed are directed to cease and be for ever extinguished. Now, however, it is attempted to raise tithes on the lands inclosed,—in flat contradiction of the purview, spirit, and language of the act,—in opposition also to the clear principle that the saving clause must give way to the pro-

visions in the body of the act.—The result of the new trial has not yet transpired.

Another mode of commuting tithes on inclosure, is by the allotment of a perpetual corn rent in lieu of all tithes within the parish. The inconvenience of this mode is, that the rent must be paid whether the lands are occupied or not. By this arrangement the parties are in the same situation as if the tithe owner had granted a lease of the tithes at an annual rent. In that case it is quite clear that it would be no answer to an action for the rent, that no tithe in kind was produced, or that the land was unoccupied. The rent is a substitute for the tithes, not merely *de anno in annum*, but for ever.

It does not, therefore, follow, that because no tithe in kind was produced, that no money rent is payable. In one sense lands may be said to be unoccupied, if the person entitled

to the possession, takes no means to make the land beneficial to himself; but although he does no act of ownership, he may still be in the legal possession and occupation of it, so as to be liable to the burden imposed by an act of parliament. The question, therefore, is not whether the land was productive or not, or whether cultivated or not, but whether the defendant is in the legal possession or not.

In a late case,¹ the Court of King's Bench was of opinion, that the landlord was in possession during the interval between the quitting of one tenant and the entry of another, so as to be liable to a corn rent imposed by an inclosure act in lieu of tithes, and that the tenant coming in under him was liable to be distrained upon for an arrear of rent accruing due during that interval, for the very act of entry by the new tenant revested the posses-

¹ *Newling v. Pearse*, 1 *Barn. & Cress.* 437.

sion in the landlord from the time when the former tenant quitted ; and this being a rent created under sanction of the legislature, was therefore payable in all events.

It is lastly observable, under this division of the subject, that by the 38th section of the General Inclosure Act, the rector or vicar, with the consent of the bishop of the diocese and of the patron of the living, may lease all or a part of the allotments set out to such rector or vicar for any term not exceeding twenty-one years. Such lease must necessarily mean a lease with all proper and reasonable clauses and covenants.¹ The word "lease" of itself imports a lease according to the custom of the country.

¹ *Smith v. Jersey*, 2 *Brod. & Bing.* 602. extending the doctrine in *Doe v. Sandham*, 1 *T. R.* 705. a case certainly contrary to the general learning of powers ; *et vide Doe v. Bettison*, 12 *East*, 309.

By an amendment of this section in the 2d year of the present reign, leases of allotments made by rectors and vicars as aforesaid, and which are avoided or determined by any means before the expiration of the time for which they are granted, may be renewed.¹

Note, that under an inclosure act, directing the commissioners to set out, allot, and *award* lands in lieu of tithes, it was held not sufficient in an action of covenant, by a lessee of the tithes, to aver, in pleading, that the lands were set out and allowed, for *that the freehold of the allotment did not vest before the award executed*. The plea should have averred that the lands were set out, allotted and awarded.²

¹ 1 and 2 Geo. 4. c. 23. s. 4.

² Ellis v. Arnison, 5 Barn. & Ald. 47.

CHAPTER VI.

Of allotments sold by the commissioners for payment of expenses, and herein of the conveyance and stamp.

MODERN inclosure acts contain a power enabling the commissioners to defray the expenses of obtaining and executing the act, either by levying a rate on the several proprietors, or, as more commonly, by enabling them to sell such allotments of land as they shall think necessary for the purpose. In every event, they should have power to sell any part of the allotments of incapacitated persons, on the application of their trustees, committees, or guardians, for payment of their share of the expenses, as otherwise considerable inconvenience might be experienced

in obtaining the contribution of such persons to the general cost of inclosure ; and the commissioners should also be empowered to convey lands sold by them for the purposes of the act, to such uses as the purchasers shall appoint, &c. according to the common uses to bar dower, and it is observable that a seisin created by this exercise of a common law authority will support a use to be executed by the statute of uses, so that the commissioners may well convey to the purchaser to such uses as he shall appoint ; but this they will seldom do unless they are expressly authorized by the local act.

By the General Inclosure Act, it is enacted,¹ that in case it shall be provided by any local act, that the expenses attending the same shall be paid by sale of any part of the land so to be inclosed, the commissioners shall set

¹ 41 Geo. 3. c. 109. s. 32.

out and sell such part of the waste or commonable lands as will, in their opinion, be sufficient to raise the expenses required ; and, upon payment of the purchase money, the land so set out and sold shall immediately thereupon be discharged of all common or *other rights* thereon, and be vested in fee-simple in, and be held in severalty by, the purchaser or purchasers thereof, as his, her, and their private and absolute property, and shall be allotted accordingly by the commissioners. It will be proper to add, in the local act, a clause declaring the commissioners' receipts to be good discharges, and that the purchasers shall not be obliged to see to the application of their purchase money.

From these extracts, it will appear that the land first vests in the purchaser by the operation of the statute, and that the award, which is often drawn up at a considerable distance of time afterwards, is only evidence of what the commissioners have done. Hence, it is

generally considered that sales of this description do not require any *ad valorem* duty to be impressed on the award. A clause, however, is now often inserted, in the House of Lords, empowering the commissioners to sell *and convey*, on which conveyance the regular stamp duty will, without doubt, attach.

But the legal estate of freehold does not pass to the allottee until execution of the award; and therefore, in a late case, where the estate was sold without any notice that it was recently allotted under an inclosure act, and it appeared that the commissioners had not made their award, and the act contained no clause authorizing a sale before the award, Lord Ellenborough was of opinion that the purchaser was warranted in refusing the title.¹ But if the purchaser is, at the time of the con-

¹ Lowndes v. Bray, *Sug. V. & P.* 301. *Cane v. Baldwin*, 1 *Stark.* 65.

tract, aware that the estate is in a progressive state of inclosure, it has been thought that the purchaser will be compelled to take the title, although the award is not executed.¹

In the case cited, however, there was a clause enabling a sale before the award ; and it is somewhat questionable, whether a court of equity would, without such a clause, compel a purchaser to take a conveyance of land which may be subsequently changed by the commissioners for land of less value or less conveniently situated.

¹ *Sug. V. & P.* 301, citing *Kingsley v. Young*, 17 *Ves.* 463 ; 18 *ib.* 207.

CHAPTER VII.

Of allotments made to joint-tenants, particular tenants, and remainder-men ; and of mortgages by particular tenants, to raise the expenses of inclosure.

THE 16th section of the General Act recites, that it may happen that some of the proprietors of lands within the parish, in respect of which allotments are to be made, may be seised thereof in joint-tenancy or as coparceners or tenants in common, *and cannot, by reason of infancy, settlement, or absence beyond seas*, make an effectual division thereof ; and therefore it is enacted, that the commissioners may, with the consent of husbands, guardians, trustees, committees, &c. make such partition and division, and allot the se-

veral purparties in severalty accordingly ; and that after such allotments are so made and declared, the same shall be held in severalty in such manner, and subject to the same uses, as the undivided shares would have been held in, and subject to, if the partition had not been made.

This clause is confined to cases where the parties are under disabilities and cannot effect a partition in the ordinary way. To extend this useful power, a provision is properly added in many modern local acts, that it shall be lawful for the commissioners, at the request of the owners, to divide and make partition of the old inclosed lands, and to award the same and all allotments in respect thereof in severalty.

Where the commissioners had awarded the allotments to the tenant in remainder, instead of to the tenant in possession, it was considered doubtful whether the tenant for life

could raise the expenses of inclosure under the provisions of the act ; but on the ground of an acknowledged privity between the particular tenant and the remainder-man,¹ it was thought probable that a court would tolerate the entry of the tenant for life to save his estate, and if so his right to raise the expenses should follow ; but it was submitted that he could not mortgage until he was in possession.

If the clause, distributing the estate in the allotment to the different uses existing in the principal lands be in the act, there can be little doubt that, to whomsoever the allotment is made, it will enure to the existing uses, whether those uses confer rights prior or posterior to the rights of the individual to whom the allotment is made. In the absence of that clause, it is assumed the parties in remainder

¹ *Pres. Shep. Tou. 36 ; 9 Co. 106 a.*

might file bills in equity for a settlement of the allotted lands agreeably to the uses existing in the principal lands.

If a local act provides that the expenses of obtaining and working the same shall be paid in proportion by the proprietors, it is enacted by the General Act (sec. 29.), that the commissioners may, on the neglect or refusal of any proprietor to pay his proportion, cause the same to be levied by any warrant under their hands, on the person or persons so making default, his or their husbands, trustees, &c. ; or the commissioners may enter personally, or authorize any other person to enter on the lands allotted, and receive the rents till the proportionate expenses are satisfied.

Then follows as powerful a provision as any in the act, enabling husbands, guardians, trustees, committees, or attorneys, as also tenants in tail, tenants for life or lives. or for

years, to charge the lands allotted to them respectively, with the expenses which the commissioners, either before or after their award, shall assess such allotments in, so as the same do not exceed 5*l.* per acre; and to grant, mortgage, surrender, lease, or demise the same allotments to any person who shall be willing to lend and pay such expenses, and to his, her, or their executors, administrators, and assigns, for any term or number of years for securing the repayment thereof.

By this means, the particular tenant pays no more than the current interest, and the body of the charge falls, as it should do, on the owner of the property. But this arrangement cannot, under the General Inclosure Act, be effected by the party himself, *before* the enrolment and publication of the award; to remedy which inconvenience, it is usual to insert in the local act a provision that it shall be lawful for the proprietors to sell or mortgage their right in the lands to be inclosed

before the execution of the award, in which case the allotments are to be made to the purchasers or mortgagees. Under this clause as it is generally penned, the particular tenant may, it is assumed, mortgage to defray the expenses of inclosure before the completion of the award.

If the particular tenant choose to pay the expenses of inclosure himself, the commissioners are empowered¹ by any deed or writing under their hands and seal, to grant, mortgage, &c. the said allotment unto such particular tenant, his executors, administrators, and assigns, for any term or number of years, to commence after the determination of the estate of such particular tenant in the premises; but so that the same term may be made void on repayment of the money advanced, with interest; and also so that no re-

¹ 41 Geo. 3. c. 109, s. 30. 2d alternative.

mainder-man shall be liable to pay any further or larger arrear of interest, than for six months preceding the time when his possession shall commence.

The concluding clause of the 30th section of the General Act is important. It declares that " every grant, charge, mortgage, surrender, lease, or demise made for defraying the expenses of the act, shall be good, valid, and effectual in law for the purposes thereby intended." For some purposes the allotment is to be treated as a new acquisition. It is, however, so far a substitution, that all liens and charges on the incorporeal hereditament, or right of common, will attach on its corporeal substitute the allotment.¹

If then the right of common be incumbered,

¹ *Steele v. Manns*, 5 *Barn. & Ald.* 22.

previously to the inclosure, to the full extent of its value, it would follow, without the lastly mentioned provision, that the term created under the inclosure for payment of the expenses, may be postponed to the payment of all other preceding charges, and so rendered ineffectual for the purposes for which it was created. This clause, therefore, does to a certain extent give the mortgagee of the allotment a preference to all other incumbrances, or rather it provides that in no case shall a mortgage for the inclosure expenses be defeated.

Hence it is a generally received proposition that mortgage terms created under inclosure acts by tenants for lives, husbands seised *jure uxoris*, and other persons having but partial interests in the premises, for the purpose of enabling such persons to defray the expenses of the inclosure, are, by the authority of the General Act, entitled to priority over all other

mortgages and incumbrances, *whether the mortgagees have notice of prior incumbrances or not.*

These terms are moreover¹ said to confer a right to the immediate possession, and to enable the mortgagee and his assignee to maintain an action of ejectment in preference to all other persons. If so, they are certainly to be regarded with more than ordinary attention in all subsequent transactions; but the act is silent as to this preference.

Where a tenant for life, who was impeachable for waste, felled timber to raise the expenses of inclosure, instead of exercising his power of mortgaging, he was decreed to

¹ 1 *Pres. Abs.* p. 165.; and *qu.* if the term is entitled to this precedence when it is assigned to attend the inheritance—when, in fact, there is no longer any chance of the mortgage being defeated?

account to the owner of the next estate of inheritance ;¹ although, according to one report of this case, there were intermediate remainders that might have arisen.²

¹ Lee v. Alston, 1 *Ves. Jun.* 78.

² 1 *Bro. Ch. Ca.* 194.

CHAPTER VIII.

Of the award ; and sales and other acts before its execution.

AS soon as convenient after the division and allotment, the commissioners are required¹ to form and draw up their award in writing, which must express the quantity of acres, roods, and perches of each respective allotment. The award must be engrossed on parchment, and be read and executed in the presence of the proprietors, at a meeting to be holden on notice given : the execution to be proclaimed in the parish church on the Sunday after ; *from the time of which proclamation only and not before*, the award is declared final and binding.

¹ 41 Geo. 3. c. 109. s. 35.

Hence it appears that the actual division and staking out of the lands, and the assigning or allotting them to the different proprietors, are preparatory measures only, of which the final completion is afterwards to be effected by the execution and proclamation of a written instrument; and, consequently, that unless this be varied by the local act, a *legal* title to an allotment is not acquired before the proclamation of the award.¹

Agreeably to these positions it has been adjudged that the allottee has only an equitable interest in the allotment before execution of the award; and, therefore, that his contract for sale cannot be carried into effect;

¹ *Farrer v. Billing*, 2 *Barn. & Ald.* 174. It seems to have been considered at one time, that minutes of the award was a sufficient reduction of the allotments to writing within the act, to fix the division as final and conclusive from that time. But the contrary was held in *Brandyshe v. Pearce*, 4 *Moore*, 109.

since he cannot convey the legal estate. In such a case the vendee must return the deposit; for if a person will sell that to which he has no title, he must return the money *in solido*.¹

On the part of the vendor it was in this case contended, that by the agreement it was to be understood that the purchaser's name would be substituted in the award for that of the vendor's, and that the purchase was in fact of such interest as the vendor had in the premises. But Lord Ellenborough was of opinion, that the defendants had undertaken for the conveyance of a legal estate; and that as it appeared they had no more than an equitable one, the plaintiff was entitled to recover the deposit for which the action was brought.

¹ Cane v. Baldwin, 1 Stark. 65. Lowndes v. Bray, Sug. V. & P. 301. 6th edit. Burroughs v. Oakley, 1 Meriv. 376.

From various circumstances the execution of the award may be, and often is, delayed for several years after the allotments have been accepted and the parties have entered into possession. During which time they have no power to make a legal conveyance. To remove this impediment a very useful clause is now commonly inserted in local inclosure acts, declaring it to be lawful for any person, who shall be entitled to any allotment by virtue of the act, to give, grant, bargain, sell, demise, surrender, mortgage, limit, convey, and assure the same, or any part or parts thereof, for all or any part of his, her, or their estate, right, or interest therein, or thereto, *at any time before* the execution of the award of the said commissioners; and that every such gift, grant, bargain, sale, demise, surrender, mortgage, limitation, conveyance, and assurance, shall be as valid and effectual in all respects, as if the same had been made after the execution of the said award; and that the commis-

sioners shall award all allotments so sold or disposed of, to the purchaser or purchasers thereof, or other person or persons who shall be entitled thereto by virtue of such sale, mortgage, or surrender.

It is generally understood that the commissioners have power to alter the allotments and fences at any time before the completion of the award ; but a special provision to that effect is sometimes introduced, with directions that they shall make recompense for any injury which such alterations may occasion. This power in the commissioners has been made a serious objection to the title of allotments contracted to be sold before the execution of the award, even where the local act has authorized a sale before the completion of that document ; for that the purchaser cannot be assured that the property, which he may have purchased for some local convenience, will be conveyed to him.

The Master of the Rolls however overruled the objection, observing that the provision in the act in review made the conveyance of the allotments before proclamation of the award, valid in law ; that the act authorized the parties to do what they could not effect without it ; that the clause was a very reasonable one, for many things might delay the award, and the parties could not in the mean time give a good legal title ; and supposing even the possibility of the commissioners varying the allotments ; yet a party purchasing an allotment, must take subject to the variation, as its liability to alteration was inherent in the very nature of the property.¹ Specific performance was consequently decreed ; and that decree was afterwards affirmed on appeal to the Chancellor.²

¹ *Kingsley v. Young*, 17 *Ves.* 473.

² 18 *Ves.* 207.

In this case it was also objected that the commissioners could not, without an express power, vary the allotments after the parties had been allowed to enter and fence them off. It would certainly be as well to insert such a power in future acts, if any occasion for its use be contemplated ; but without an express clause it is clear that the commissioners have plenary power to re-arrange the allotments if they should be of opinion that the lands would be more advantageously disposed in another shape ; such a remodeling of the allotments has, however, never, it is believed, been effected. It was also stated, that the power enabling the allottee to sell, did not enable him to transfer the legal estate ; but the Lord Chancellor said, that the local act having provided that the allotments should be capable of disposition before the award, he could not in a court of equity say, that a contract entered into

for sale and purchase, should not be carried into execution.¹

The learned author of "Vendors and Purchasers" observes,² that if there *is no ground to suppose that the commissioners will vary the allotments*, the title must be accepted. If the purchaser is acquainted that the lands, or part of them, which he has purchased, are in a progressive state of inclosure, their liability to alteration before the execution of the award is, we have seen, an inherent quality in the estate of the land,³ and will not consequently of itself afford the purchaser an opportunity of rescinding his contract, for he would be presumed aware of such liability at the time he purchased, being acquainted that the award was not complete.

¹ 18 Ves. 208.

² Sug. V. & P. 301. 6th ed.

³ Kingsley v. Young, sup.

From the foregoing observations this general principle may be collected, that the legal estate of freehold does not pass to the allottee until after the execution and proclamation of the award, unless an ample power be inserted in the local acts (as above), enabling the allottee to sell and convey before enrolment of the award; in which case the legal seisin does, in fact, pass, or is under the control of the allottee on allotment.¹

The award is not a conveyance in any point of view: it is rather the evidence than the constitution of title. The legal estate passes by virtue of the act. The commissioners do not grant or convey, nor is any technical form necessary in their award;² but the word "award" should in strictness be

¹ *Farrer v. Billing*, 2 *Barn. & Ald.* 171. *Ellis v. Arnison*, 5 *ib.* 47.

² *Peck v. Clarkson*, 2 *W. Black.* 1318.

used. The commissioners have no estate in the land; consequently the heir at law of the survivor can never be a necessary party to a conveyance. The award cannot be vitiated by error in the allotment,¹ nor can it be set aside on account of obscurity.²

The general act does not state when the allottees are to take possession, whether before or after the execution of the award: it merely provides, that after the commissioners have staked out the allotments, the persons to whom the same are allotted, may, with the consent of the commissioners, enter to ditch, fence off, and inclose the same;³ but all rights of common are to cease on notice to that effect being given by the commissioners, and affixed by their direction on the

¹ *Cooper v. Thorpe*, 1 *Swan*. 92.

² *Anon. Tidd's Prac.* 875.

³ *Sect.* 19

parish church door ;¹ which notice is one of the earliest acts the commissioners perform.

The local act usually remedies this omission ; and without such remedy, the commissioners may, without doubt, make any general direction respecting the occupation of the allotments, which will not afterwards interfere with, or impede the purposes of the act.

By a late act² it is provided, that it shall be lawful for all persons to whom any allotment shall be made, *and to whom possession hath been given by the commissioners*, and who shall have demised the same, or any part thereof to any tenant or servant, and for their, his, or her bailiff or agent, to enter into and upon any such allotment, and to seize, and distrain any goods, chattels, or effects, which may be in or upon the same,

¹ Sect. 14.

² 1 & 2 Geo. 4. c. 23. s. 1.

notwithstanding the award of the commissioners shall not be executed and perfected.

The award is to be enrolled in one of the courts of Westminster, or with the clerk of the peace for the county, in which the lands lie, to the end that recourse may be had thereto by any person interested therein; for the inspection and perusal whereof, no more than one shilling shall be paid; and a copy of the said award, or any part thereof, signed by the proper officer of the court, wherein the same shall be enrolled, or by the clerk of the peace for such county, or his deputy, purporting the same to be a true copy, shall from time to time be made and delivered, by such officer or clerk of the peace for the time being as aforesaid, *to any person requesting the same*; for which no more shall be paid than twopence for every sheet of seventy-two words; and the said award, and each copy of the same, or of any part thereof, signed as aforesaid, shall at all times

be admitted and allowed in all courts whatever as legal evidence.

Note.—A commissioner cannot purchase any lands, tenements, or hereditaments within the parish which he is commissioned to inclose, either in his own name, or in the name of a trustee, until five years after the proclamation of the award.¹

¹ 41 Geo. 3. c. 109. s. 2.

CHAPTER IX.

Acceptance of allotment ; allotment to the lord ; proof of title ; double allotment ; liability of allotment to poor rates ; mode of claiming allotment ; of timber on allotments ; of allotments of common for small proprietors ; death of commissioner ; abstract ; map ; parcels.

TWO calendar months are allowed after the execution of the award, as the period within which all allotments are to be accepted by the several persons to whom they are made ; and if such persons neglect or refuse to accept the same, they are totally excluded from having or receiving any estate or interest, or right of common in any part of the lands or grounds divided and inclosed.¹ But the act is silent

¹ 41 Geo. 3. c. 109. s. 17, *et infra* page 134 as to the proof of acceptance.

as to the ultimate disposition of any rejected allotment.

The 24th section enables the commissioners to inclose, fence, and let the neglected lands, and to receive the rents till the proportionate expenses of the act are defrayed ; but it does not state in whom the allotment is to vest after the expenses are paid. If the commissioners have executed their award, can they re-allot the lands so thrown back on their hands, or rather would not such rejected allotment escheat to the lord for want of a tenant? In ordinary cases the estate would result to the grantor, but here the commissioners have finally executed their trust, (according to some cases, though not so according to others,) and no estate or tenancy is vested in them, nor in the general body of proprietors, who have no legal interest in the allotments till they are respectively awarded to them.

One-twentieth part of the whole waste or

commonable place to be inclosed, is usually the proportion allotted to the lord of the manor in respect of his interest in the soil. A question arises, whether he is entitled to a further allotment in respect of any rights of common he may claim as belonging to his demesne lands in the parish intended to be inclosed. Common is defined to be a profit which one man hath in the land of *another*.¹ Can a man have a right of common in his own land? Certainly not. There does, therefore, seem some incongruity in allowing the lord an allotment in respect of rights of common over his own soil.

Such, however, has been decided in a recent case,² not on general principles, but on the particular wording of the local act, which directed that one-twentieth part should be al-

¹ 2 *Black. Com.* 32.

² *Arundell v. Falmouth*, 2 *Mau. & Selw.* 440.

lotted to the lord in compensation of his right to the soil; and then that the residue should be divided among the *proprietors or several persons interested therein* in compensation for their lands, rights of common, and *other rights*; and the Court of King's Bench determined that the lord in this case, who was the owner of a farm in the parish of about 273 acres, was a proprietor within the meaning of the act, and as such was entitled to a further allotment in respect of the farm.

In the language of Lord Ellenborough, the lord of the manor was *interested* in the division in a two-fold way: first, as lord of the soil, and, secondly, in respect of that estate, which, if in the hands of another person, would have conferred a right of common and commanded an allotment; and although the lord, being owner of the soil of the waste, could not in strictness claim a right of common over it in respect of his demesnes, inas-

much as during the unity there would be a merger of that right ; yet he had such an interest in respect of his estate as the commissioners might well contemplate, and which, under the words of the act in question, they might lawfully assign him a compensation for.¹

To prove a title to allotments under inclosure acts on the part of the lord, testimony of his being owner of the soil will be necessary ; on the part of the commoner, proof of having exercised his right under the particular circumstances of his claim will be sufficient. It is not, however, necessary for the lord to prove, that there is such a manor existing in law as that of which he calls himself lord, to bring him as a plaintiff within the meaning and letter of the act of parlia-

¹ *Arundell v. Falmouth*, 2 *Mau. & Selw.* 442.

ment, it will be enough for him to shew that he was the owner of the waste, which may be done by proving acts of ownership.¹

If there be two distinct rights of common appertaining to one tenement in different manors, the commoner will be entitled to an allotment in respect of both rights.²

Every species of tenement within a parish, yielding a certain profit, is rateable to the poor rates. Common lies not in tenure, though for some purposes, as for parochial settlements, it is said to be a tenement.³ Common in gross even, has been held to be a tenement; and it should seem from thence to

¹ *Smith v. Smith*, 2 *Price*, 101.

² *Hollingshead v. Walton*, 7 *East*, 485.

³ 1 *Watk. Cop.* 40 n. 4th ed

follow, that it is rateable to the poor rates.¹ Tolls in gross are not rateable for want of a corporeal quality.² Canal shares are rateable as a profit arising from land covered with water.³

Allotments are of course rateable, and as it is assumed, on a new assessment; but the General Inclosure Act contains no directions on this head, and therefore it would not be improper to insert a specific clause in future local acts, directing in what way the allotments shall be assessed to the poor rates and taxes, and in what hamlet or township they

¹ *Per* Ld. Ellenborough in *Rex v. Watson*, 5 *East*. 485.

² *Rex v. Bell*, 5 *Mau. & Selw.* 222. *Rex v. Trent and Mersey Nav.*, 4 *Barn. & Cress.* 57.

³ *Rex v. Palmer*, 1 *Barn. & Cress.* 546. 2 *Dow. & Ry.* 793. *Rex v. Oxford Canal*, 4 *Barn. & Cress.* 74.

shall be considered tenements for parochial and all other purposes. *Prima facie*, they are rateable in the parish where they are situated ; as where proprietors of lands in A. had common in the parish of B., it was holden that they were liable to be assessed in respect of lands inclosed from the common in B.¹

Where an inclosure act directed that the commissioners should ascertain what yearly sum the vicarial tithes of the parish were worth, and that there should be issuing and payable to the vicar, out of the lands, such yearly sum, " free and clear of all rates, taxes, and deductions whatsoever," it was holden that the vicar was not rateable to the poor in respect of the yearly sum so ascertained and paid to him.²

¹ *Kempe v. Spence*, 2 *W. B.* 1244.

² *Chatfield v. Ruston*, 3 *B. & C.* 863.

The 6th section of the General Act provides, that all claimants of common, or other rights in lands to be inclosed, shall deliver in to the commissioners an account or schedule in writing, signed by themselves, or their respective husbands, guardians, trustees, committees, or agents, of such their respective rights or claims, and therein describe the lands and grounds, and the respective messuages, lands, tenements, and hereditaments, in respect whereof they shall respectively claim to be entitled, with the name or names of the person or persons then in the actual possession thereof, and the particular computed quantities of the same respectively; and of what nature and extent such right is, and also in what rights, and for what estates and interests they claim the same respectively, *distinguishing the freehold from the copyhold or leasehold*;—evidently shewing an intention in the legislature, that a distinction should be made in the allotments for several titles and tenures in one owner.

A non-compliance with this requisition will exclude the party from all participation in the lands to be divided, if the commissioners, either casually or intentionally, omit to make him any allotment. The claims so delivered in are to be open to all persons, who may take copies thereof, and present objections to the same at a special meeting to be appointed for that purpose. The objections here referred to, must of necessity be confined to local matters, as by the next section of the act, the commissioners are expressly forbidden to adjudicate disputes touching rights or titles, but are directed to assign the allotments to the persons in the actual seisin or possession.

On the principal provision Sir W. D. Evans observes, "the drawing a claim conformable to this clause, requires a very considerable portion of technical accuracy ; and I have, in practice, known many valuable rights defeated

in consequence of the informality of the claim. The discretion reposed in commissioners upon this subject is extremely liable to abuse, as such commissioners have, if not generally, at least very frequently, the feeling of agents for the parties by whom they are nominated ; and I have actually heard a commissioner avow, that he considered himself as the agent of a particular description of claimants ;¹ and it is obvious that a person with such feelings may be induced to admit or reject the presentation of further claims, according to the interests which he is disposed to espouse. The most suitable remedy for this inconvenience would be a general enactment, that all objections to claims should be particularly stated in writing ; and that the claimant should be at li-

¹ Lords of manors, collegiate owners, and corporate bodies, possessing lands in the parish to be inclosed, often insist on having one of the commissioners of their own nomination and appointment.

berty to amend his claim in the particulars objected to.”¹

The importance of this claim is further manifested by a late case, where an allotment was made to a person in the visible possession, but whose title was afterwards questioned. The claimant had omitted to comply with the requisitions of this section, and the court refused to acknowledge his right to the allotment, whether he had title or not.

The case was briefly this :—A testator being seised of a messuage and twenty-four acres of land at D., purchased the tithes thereof of the lay impropriator, and devised the same to trustees for sale, by the description of his freehold messuage and tenement at D., and all the *profits* arising therefrom. The

¹ 1 *Evan. Stat.* 29 n. 2d ed.

trustees sold the estate and tithes to the defendant, who, at the time of inclosure, was in possession, and the commissioners set out an allotment to him in lieu of the tithes, and another allotment in respect of the land.

The testator's heir-at-law contended, that the word *profits*, in his ancestor's will, was insufficient to pass the tithes which, in consequence, descended to him ; and on that ground he commenced an ejectment against the allottee, for recovery of the lands set out to him in lieu of the tithes. It appeared that the commissioners had not executed their award at the time of trial, but no notice was taken of that circumstance. The heir-at-law had not made any claim for an allotment in respect of tithes at a meeting duly holden by the commissioners for receiving claims ; nor, indeed, had any claim been put in for an allotment in respect of the tithes, by any one. The question was, whether the heir-

at-law was entitled to recover the allotment after it had been marked and staked out by the defendant.

The Court of Common Pleas declined giving any opinion on the construction of the word *profits*; but decided, that the heir-at-law, if he had any right to the tithes, was barred of all claim to the allotment, by reason of his non-compliance with the requisition of the 6th section of the General Inclosure Act, which required a specification of all claims to be delivered in to the commissioners; or in default thereof, the right to be totally barred, and the party excluded from all benefit and advantage of the inclosure. Unless this were so, observed the court, the commissioners might make an allotment, and when the occupier had gone to expense in improving it, another claimant might come and establish a superior title. It would be manifest injustice to allow any such attempt, and inconsistent with the expressions of the General Inclosure

Act. The excellent maxim of law was, *vigilantibus et non dormientibus subveniunt leges*. Judgment was therefore given for the defendant.¹

In this case, it was further contended, that the 6th section of the General Act did not apply to tithes. It appeared, however, to the court, that it was equally necessary for the owners of tithes to make their claim before the commissioners, as for the owners of land. The word *hereditaments* was a word peculiarly applicable to tithes, and it was introduced to prevent the mischiefs arising from omission to establish a claim before the commissioners. It was intended, that every person should assert his right within a given time, and if he omitted to do so, should forfeit all right. In the present case, meetings were regularly holden ; the heir made no claim ; if

¹ Doe v. Jefferson, 2 Bing. 125.

he could now come forward with success, he might lie by till the land was improved, and then recover it with all its improvement, which could never be allowed.¹

By the 22d section of the General Act, it is directed that all timber and other trees, thorns, and bushes, on the lands allotted, shall become the property of the respective allottees, they paying the owner of the said trees such sums for the same as the commissioners shall direct.²—Who is the owner of such trees?—It is presumed, the lord of the manor, who has the power to plant trees on his own waste, provided they do not injure the rights of the commoners.³

¹ 1 *Bing.* 125. This reasoning, however, is scarcely sustainable, as the greatest possible improvement could not alone give title to land.

² 41 *Geo.* 3. c. 109. s. 22.

³ *Kerby v. Sadgrove*, 1 *Bos. & Pul.* 13.

Where there are several small commoners, it is not unusually provided in local acts, that the commissioners shall set out a piece of land whereon the smaller proprietors shall enjoy a right of intercommoning for a limited number of cattle. In a case where the commissioners, under a provision of this kind, awarded that certain persons should for ever thereafter use and enjoy a specific allotment, as a common of pasture, exclusive of all others whatsoever, it was held, that the rights of the commoners were still subservient to the right of the lord to take stone from underneath the soil as he had theretofore done, it appearing that both before and *since* the award the lord had exercised that right.¹ If the lord, in this instance, purchase all the rights of common, he of course becomes

¹ *Place v. Jackson*, 4 *Dow. & Ry.* 318.; but see *Johnson v. Hodson*, 8 *East.* 38., where the lord of the manor was held to be a trustee for the allottee of herbage.

seised in fee-simple in severalty, the rights merging in the lordship or seignory.

On the death of a commissioner, before the execution of the award, it is essential, in regard to a strict deduction of title to the allotment, to observe that his successor has been duly appointed. For this purpose, the minutes of his appointment should be called for. It was also observable, that where three commissioners are appointed, and the act declares that the acts of any two shall be binding,—yet it requires the *existence* of three commissioners for the valid performance of acts by the other two. On this ground it has been held, that one commissioner being dead, the acts of the other two are invalid.¹

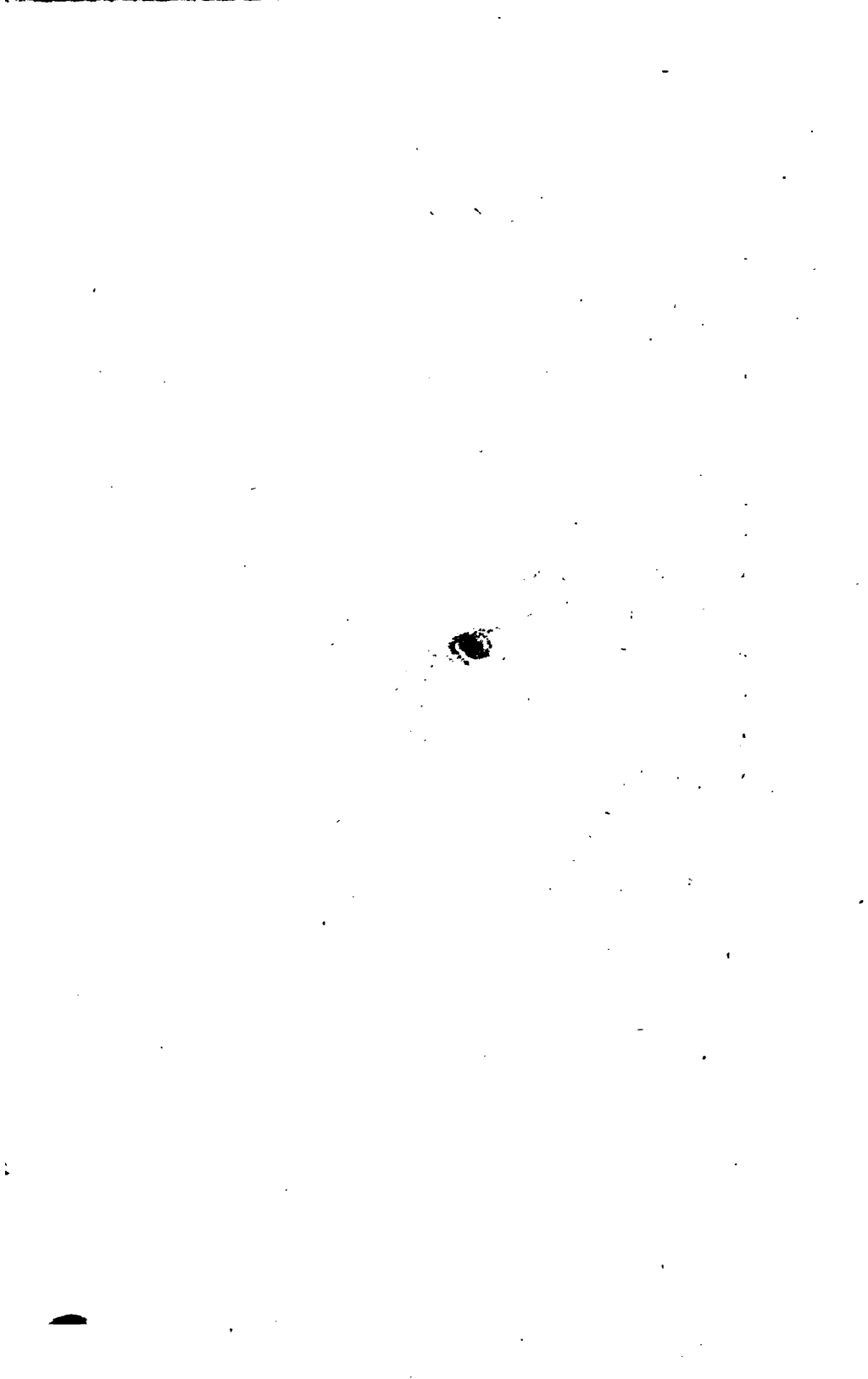
¹ Doe v. Middleton, 3 Brod. & Bing. 214. As to a commissioner's liability for expenses, see Eaton v. Bell, 5 Barn. & Ald. 34.

An abstract of title to allotments should be supported by official extracts of the award, and a copy of the local act of parliament; and the purchaser is entitled, at the vendor's expense, to compare the description of the parcels in the abstract with the map usually deposited with the award; by which means he may, in most cases, be able to discover the situation of the old inclosures, and so perhaps to identify the lands. This identification is sometimes matter of great difficulty, by reason of the alteration effected by the inclosure, in the boundaries of the several lands within the parish. Where such extensive alterations are in contemplation, or likely to arise, it would perhaps be advisable to preserve a plan of the parish as it stood at the time the inclosure-surveyor entered it, especially if *common field lands are to be inclosed*. The utility of such a plan must be apparent, when it is recollected that the allotments are to be considered as comprehended in the former conveyances, and that the descriptions

in those conveyances may often and generally do require a comparison with the actual situation of the lands to render them intelligible.

It is further worthy of note, that the preparation of plans and maps, for the purpose of carrying an inclosure into effect, is no evidence of an allotment, under an act which gives an appeal against an allotment within six months after a cause of complaint has arisen, and it suffices to appeal within six months from the time when the allotment was conclusively made.¹

¹ *Rex v. Middlesex J.*, 1 *Chit. Rep.* 366.



I N D E X.

A.

ABSTRACT

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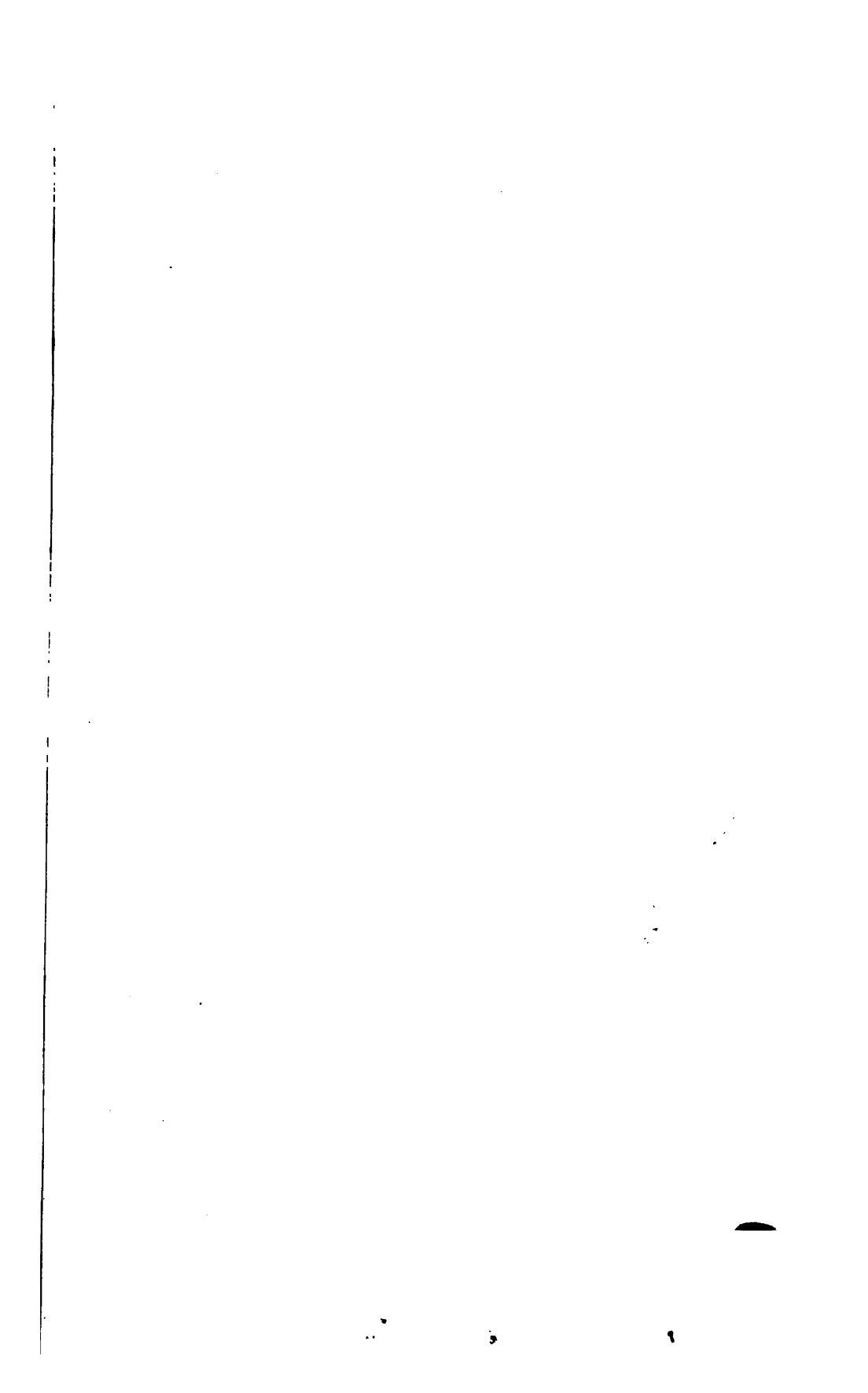
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